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In The

Supreme Court of the United States

October Term, 1989

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

RAYFIELD NEWLON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE EIGHTH AMENDMENT'S PROHIBITION AGAINST THE ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY REQUIRES THE SENTENCER (THE JURY) TO USE A LIMITING DEFINITION OF THE STATUTORY AGGRAVATING CIRCUMSTANCE OR WHETHER THE STATE APPELLATE COURT'S LIMITING CONSTRUCTION OF THE "VILE, HORRIBLE OR INHUMANE" STATUTORY AGGRAVATING CIRCUMSTANCE ADEQUATELY NARROWS THE POOL OF CAPITAL MURDERERS IN MISSOURI WHO ARE ELIGIBLE FOR THE DEATH PENALTY.

II.

WHETHER A FEDERAL COURT SHOULD REVIEW UNDER THE DUE PROCESS CLAUSE THE PROPRIETY OF A PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT SINCE THE DUE PROCESS CLAUSE DID NOT "DICTATE" THE GRANT OF RELIEF WHEN RESPONDENT'S CONVICTION BECAME FINAL OR, IF FEDERAL-COURT REVIEW IS APPROPRIATE, WHETHER THE PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT VIOLATED RESPONDENT'S DUE PROCESS RIGHTS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit affirming the judgment granting the petition for writ of habeas corpus is reported at 885 F.2d 1328 (8th Cir. 1989) (App. 2). The Order of the United States District Court for the Western District of Missouri granting the petition for a writ of habeas corpus is reported at 693 F.Supp. 799 (W.D.Mo. 1988) (App. 37).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on September 18, 1989 (App. 2). Petitioner's timely petition for rehearing was denied on November 15, 1989 (App. 1). Pursuant to 28 U.S.C. §2201(c) and Supreme Court Rule 20, the present petition for a writ of certiorari was required to be filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

2. Section One of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 565.012.2(7), RSMo 1978, provides:

> Statutory aggravating circumstances shall be limited to the following:
>
> * * *
>
> (7) The offense was outrageously or wantonly vile, horrible or inhumane in that it involved torture, or depravity of mind.

STATEMENT OF THE CASE

The facts surrounding respondent's murder of Mansfield Dave were succinctly articulated by Judge Rendlen in the Missouri Supreme Court's Opinion from respondent's direct appeal to that court.

> On April 24, 1978, at approximately 10:20 p.m., Mr. Mansfield Dave sent his wife and son home from the "Quick Shop" "convenience" store they operated as a family in Kinlock. About twenty minutes later, an alarm sounded[,] alerting Mrs. Dave to possible trouble at the store[,] and when she ran there, she found her husband on the floor dead or dying from two shotgun wounds in the upper body.
>
> This steady flow of events that fateful April 24 led to Mansfield Dave's murder. Earlier in the day[,] appellant brought a single-shot 16[-]gauge shotgun to the home of Walter West, a friend of appellant['s] for more than 10 years. At appellant's request, West brought him a hacksaw which they used to saw off portions of the barrel and the stock. The shotgun[,] so shortened[,] measured about 22 inches and could be concealed beneath a short jacket or inserted barrel[-]first in the waistband of a man's trousers[,] with a shirt or jacket over the stock. Leaving the home[,] they walked along a back road to a liquor store, and on the way[,] appellant, who had seven or eight shells in his pocket, test[-]fired the gun into some weeds. During this time[,] appellant suggested they rob Mr.

Dave's "conveniency" store because he wanted "some money." Reaching the liquor store, appellant, who had concealed the gun in his heavy fur-trimmed jacket which extended to his mid-thigh, bought a six-pack of beer, and as they left, West flagged down a passing car driven by Franz Williams, another friend who had attended school with appellant through the seventh grade. The two men entered Williams' car, and when they told him of the robbery plan, Williams agreed to join the scheme. With Williams driving, the trio went to Mr. Dave's Quick Shop where West, apparently to size [up] the situation, entered the store, bought a pack of cigarettes and[,] returning to the car[,] reported there were too many people present to carry out the robbery at that time. The men drove back to the liquor store and purchased another six-pack of beer, then continued cruising the neighborhood in Williams' car.

At approximately 10:30 p.m., the three conspirators again drove to the victim's store and found the customers had gone. Only Mr. Dave remained. Williams and appellant then entered the store while West, who remained in the car, drove to a place in front of the building to permit a view of the store's interior. Williams went toward a soda case in the rear as appellant walked to the sales counter behind which Mr. Dave was standing. Above that counter, plexiglass panels formed a partial physical, though not a visual, screen for the back counter area. Appellant, [sic] stationed himself at a point where an opening occurred in the screen and there confronted Mr. Dave[,] who[,] after a moment's conversation, turned his back[–]apparently to get cigarettes from a rack. It was then that appellant drew the sawed-off shotgun[,] concealed in his clothing[,] and aimed it at his victim. As Mr. Dave turned back toward the counter, appellant[,] with a blast

from the shotgun[,] knocked him to the floor. Appellant then deliberately broke open the single[-]action gun, extracted the spent shell, reloaded, and peering over the counter with Williams, who had by then come to the front of the store, once more hand[-]cocked the gun, took aim and again shot Mr. Dave. He again broke open the gun, extracted the second spent shell and followed Williams from the store. Once outside[,] the two ran in different directions[,] but were shortly picked up by West in the car[,] and as appellant reentered the car[,] he stated that he had to "burn" (kill) Mr. Dave. Though the robbery plan failed, as no money was taken from the store, the murder succeeded when Mr. Dave died from the wounds, one in the upper left chest and the other in the upper left shoulder.

After Mrs. Dave heard the alarm and was running to the store, she saw Williams and noted he was not carrying an object of any kind, which is corroborative of the testimony that appellant (not Williams) had the gun and did the killing. The police were promptly summoned to the scene and[,] in their investigation[,] found two spent 16[-]gauge shotgun shells and, sitting on the counter, a cold bottle of Nehi orange soda bearing Williams' fingerprints. This[,] too[,] corroborates the testimony that Williams had gone to the rear of the store to get the soft drink from the case while appellant confronted and shot Mr. Dave at the counter near the front. The night after the homicide, appellant delivered the shotgun to West's home where West applied some tape on the shortened stock which had loosened and later asked his cousin, Kevin Hughes, to take the gun from the house. Hughes did so, but apparently apprehensive of the situation, delivered the gun to Chief Patton of the Kinlock Police and was paid $24.

Defense counsel characterized Hughes to the jury as the "little snitch."

The police[,] in their later investigation[,] found the sawed-off portions of the barrel and stock at West's house and determined the shotgun was the weapon which had fired the two spent cartridges found at the murder scene.

Appellant was[,] at the time of the murder[,] a 23-year-old black man, with an 11-grade education. He had four convictions of burglary second degree, three convictions of stealing and one conviction of larceny. Though, [sic] the record is unclear [as to] how much total time was imposed[,] his sentences totaled at least 12 years and perhaps more. Appellant had served part of this time in the penitentiary. In an initial statement to the police, he admitted his presence at the scene[,] but contended he had stayed in the car while West and Williams went inside the store. He later made a videotaped statement and changed his story, admitting that Williams and *indeed* he had entered the store[,] but asserted that Williams did the shooting while he, appellant, went to the soda case at the rear of the store. In this videotaped statement[,] he also admitted he knew the purpose of their entering the store was to carry out a "heist" (robbery)[,] and in this statement[,] he also asserted that Franz Williams[,] while standing near the car before entering the store[,] stated that "I [Franz Williams] might have to shoot him [Mr. Dave] because he knows me." Thus[,] the possibility of killing Mr. Dave to eliminate any witness was implicitly a part of the plan. In this connection[,] it is important to note that appellant knew the "place," that he had been in the store on prior occasions and was familiar with the store and some of the people who worked there. He knew the store was close by and that the men could "walk" to it. Easy accessibility

> appears to have been a consideration in choosing that store to rob, all of which suggests that destroying the witness was a motive for the killing. At trial, again changing his story, appellant stated he was not present at the scene of the crime.

State v. Newlon, 627 S.W.2d 606, 609-611 (Mo. banc) (footnotes omitted), *cert. denied*, 459 U.S. 884 (1982) (App. 119). The cause went to trial before a jury on July 30, 1979, in the St. Louis County Circuit Court, the Honorable James Ruddy presiding. At the close of the evidence, instructions and arguments of counsel, the jury found respondent guilty of capital murder. Section 565.001, RSMo 1978 (repealed 10-1-84). After the penalty stage, the jury returned a sentence of death (App. 190). The Missouri Supreme Court affirmed respondent's conviction and sentence (App. 119). The petition for a writ of certiorari to the Missouri Supreme Court was denied. *See, Newlon v. Missouri*, 459 U.S. 884 (1982).

After affirmance of his conviction and sentence, respondent filed a motion to vacate judgment and sentence pursuant to Missouri Supreme Court Rule 27.26 (repealed effective 1-1-88). The motion was amended, and an evidentiary hearing was held on April 2, 3, 5 and 6, 1984, before the Honorable Arthur Litz. The St. Louis County Circuit Court delivered its Findings of Fact, Conclusions of Law and Order that denied respondent's request for post-conviction relief (App. 114). After consideration of respondent's claims on appeal, the Missouri Court of Appeals affirmed the denial of relief (App. 103). *Newlon v. State*, 705 S.W.2d 590 (Mo.App., E.D. 1986). After the Missouri Supreme Court denied his application

for transfer, respondent began the federal attack upon his conviction and sentence.

Respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on April 10, 1986, in the United States District Court for the Western District of Missouri (App. 70). Following pleadings, briefs, an evidentiary hearing and proposed findings of fact and conclusions of law, District Judge Scott O. Wright filed an order issuing a writ of habeas corpus to respondent, vacating his sentence of death (App. 37). *Newlon v. Armontrout*, 693 F.Supp. 799 (W.D.Mo. 1988). Petitioner filed a timely notice of appeal. The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court (App. 2). *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989). Petitioner's petition for rehearing was denied (App. 1). This petition for a writ of certiorari ensues.

ARGUMENT

I.

THE EIGHTH AMENDMENT'S PROHIBITION AGAINST THE ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY DOES NOT REQUIRE THE SENTENCER (THE JURY) TO USE A LIMITING DEFINITION OF THE STATUTORY AGGRAVATING CIRCUMSTANCE, AND THE STATE APPELLATE COURT'S LIMITING CONSTRUCTION OF THE "VILE, HORRIBLE OR INHUMANE" STATUTORY AGGRAVATING CIRCUMSTANCE ADEQUATELY NARROWS THE POOL OF CAPITAL MURDERERS IN MISSOURI WHO ARE ELIGIBLE FOR THE DEATH PENALTY.

The United States Court of Appeals for the Eighth Circuit determined that since respondent's sentencer, the jury, was not provided with a definition of the "depravity of mind" statutory aggravating circumstance, §565.012.2(7), RSMo 1978 (repealed effective 10-1-84), respondent's Eighth Amendment rights against the arbitrary and capricious application of the death penalty were violated (App. 14-16). The putative Eighth Amendment violation could not be cured later by the state appellate court's limiting construction of the statutory aggravating circumstance – at least according to the Court of Appeals (App. 17). Since the Court of Appeals' analysis is not proper under the Eighth Amendment – at least as interpreted by this Court – petitioner believes this Court's discretionary review of the Court of Appeals' judgment is warranted.

This Court should issue a writ of certiorari in this case due to the important question of federal law involving the construction of the Eighth Amendment – in particular, whether a state appellate court's assurance that

the death penalty will not be arbitrarily or capriciously imposed is sufficient to protect a defendant's Eighth Amendment rights. Supreme Court Rule 17.1(a), (c). Additionally, the federal courts of appeals that have reviewed this question have come to an opposite conclusion from that of the United States Court of Appeals for the Eighth Circuit. In the past, the Court has gone to great lengths to determine whether statutory aggravating circumstances sufficiently channeled the jury's discretion in opposing a death sentence. *See, Godfrey v. Georgia*, 466 U.S. 420 (1980); *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988); *Walton v. Arizona*, 110 S.Ct. 49 (1989); *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc), *petition for certiorari filed*, 57 U.S.L.W. 3655 (U.S., Apr. 4, 1989) (No. 88-1553). The Court should continue that tradition in the present case.

In Missouri, the role of statutory aggravating circumstances is similar to that played by the statutory aggravating circumstance in Georgia. "The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence." *State v. Shaw*, 636 S.W.2d 667, 675 (Mo. banc), *cert. denied*, 459 U.S. 928 (1982), *citing, State v. Bolder*, 635 S.W.2d 673, 683 (Mo. banc 1982), *cert. denied*, 459 U.S. 1137 (1983); *Gregg v. Georgia*, 428 U.S. 153, 197 (1976). By statute, the jury at respondent's trial was required to make a written finding of the existence of at least one "statutory aggravating circumstance" before it could even consider imposing a sentence of death. Section 565.012.5, RSMo 1978 (repealed effective 10-1-84). The jury was instructed on two statutory aggravating

circumstances (App. 184, Instruction No. 19). In its verdict, the jury found one statutory aggravating circumstance to exist:

> Whether the murder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman.

[App. 190.] This is the statutory aggravating circumstance enumerated in §565.012.2(7), RSMo 1978 (repealed effective 10-1-84). The finding of a statutory aggravating circumstance made respondent eligible for the jury to consider the death penalty. After the jury found respondent eligible, then it could consider all the evidence in considering the penalty. *See, State v. Shaw*, 636 S.W.2d at 675; *Mercer v. Armontrout*, 844 F.2d 582 (8th Cir.), *cert. denied*, 109 S.Ct. 249 (1988).

During the jury's penalty-phase deliberations, the jury requested the court to provide a definition of "depravity of mind" (App. 189). The trial court informed the jury that it could provide no further instruction (App. 189). The United States Court of Appeals for the Eighth Circuit found that since the jury did not understand the meaning of the statutory aggravating circumstance, the death penalty in this case is arbitrary and capricious (App. 15-16). The Court of Appeals condemned the trial court for not providing "a clear limiting directive" of the term "depravity of mind" (App. 16). Nothing in this Court's jurisprudence, however, requires the jury to have such a definition where there is meaningful appellate review that applies a limiting construction of the statutory aggravating circumstance. *See, Godfrey v. Georgia, supra.*

In *Martin v. Maggio*, the United States Court of Appeals for the Fifth Circuit ruled that the Eighth Amendment did not require a definition of the statutory aggravating circumstance. The court held:

> The instructions alone need not, as Martin claims, embody the "clear and objective standards" for the death sentence, for "the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."

711 F.2d 1273, 1284 (5th Cir. 1983), *cert. denied* 469 U.S. 1028 (1984), *quoting, Gregg v. Georgia*, 428 U.S. at 195. While Justice Marshall has taken the position that the jury instructions must include the narrowing instruction of potentially overbroad aggravating circumstances, other members of this Court must not have agreed. *Id.* at 1285 n. 14, *citing, Williams v. Maggio*, 679 F.2d 384, 406 (5th Cir. Unit A 1982) (en banc) (Randall, J., dissenting), *cert. denied*, 463 U.S. 1214 (1983). Indeed, Justice Marshall expressly articulated that an unconstitutionally vague statutory aggravating circumstance could not be cured by a later narrowing construction by a state appellate court. *Godfrey v. Georgia*, 446 U.S. at 437 (Marshall, J., concurring). Justice Marshall's position seems to be that taken by the Court of Appeals (App. 14-16, 17). Since that position seems inconsistent with the position of the other justices in *Godfrey*, the Court should issue a writ of certiorari to make express the position that is at present implicit in *Godfrey*.

The Court of Appeals relies upon this Court's opinion in *Maynard* to support its position that the jury must have a limiting definition of the statutory aggravating

circumstance (App. 17). No language in *Maynard* suggests that the jury must have a limiting definition of the statutory aggravating circumstance. No language in *Maynard* suggests that a state appellate court's limiting construction of the statutory aggravating circumstance is a constitutionally insufficient method by which to limit the pool of murderers eligible for the death penalty. *See, Maynard v. Cartwright*, 108 S.Ct. at 1857.

Since under Missouri law the significance of the statutory aggravating circumstance is merely to determine whether a defendant is eligible to be considered for the death penalty, it is constitutionally insignificant whether that determination is made by a jury, the trial judge or an appellate court. Since the Court of Appeals' requirement that the jury have a limiting definition of the statutory aggravating circumstance is unsupported by this Court's cases and by the principles underlying the Eighth Amendment, the analysis of the Court of Appeals is erroneous. Given the significance of the Court of Appeals' opinion to other Missouri cases and to the other States in the circuit with capital punishment, the petition for writ of certiorari should issue.

In the present case, there was appellate review that applied a limiting construction to the statutory aggravating circumstance. The Missouri Supreme Court held, *inter alia*,

> [Respondent] argues there was no torture involved and thus a reversal of the death sentence is required under *Godfrey, supra*. However, it should be pointed out that if Mr. Dave was [sic] dead after the initial shot, the second blast, deliberately performed in the manner described, would have served to mutilate the corpse, a

> macabre purpose demonstrating depravity. If, on the other hand, Mansfield Dave was [sic] still alive, the second shot was to insure [sic] the killing, and the first blast from this sawed-off shotgun must have inflicted extreme suffering. The record supports the finding of depravity.

State v. Newlon, 627 S.W.2d at 622 (App. 150-151). It is apparent from the Missouri Supreme Court's opinion that the court examined the facts supporting a limited construction of the statutory aggravating circumstance. This is the role of the state-court appellate review contemplated by *Godfrey*. *Godfrey* does not mandate the trial court's giving a limiting instruction to the jury where the state-court appellate review exists to determine whether the facts of the case support the existence of a statutory aggravating circumstance that narrows the jury's sentencing discretion. *See, Godfrey v. Georgia*, 446 U.S. at 429.

The Court of Appeals determined that the Missouri Supreme Court did not apply a limiting construction of the statutory aggravating circumstance until *State v. Preston*, 673 S.W.2d 1 (Mo. banc), *cert. denied*, 469 U.S. 893 (1984), and *State v. Griffin*, 756 S.W.2d 475 (Mo. banc 1988), *cert. denied*, 109 S.Ct. 3175 (1989). Although *Preston* and *Griffin* were decided after *Newlon*, the Missouri Supreme Court was not writing on a blank slate with those latter cases. In *Preston*, the Missouri Supreme Court listed factors it previously found to support a determination that "depravity of mind" existed. *State v. Preston*, 673 S.W.2d at 11, *citing*, *State v. Blair*, 638 S.W.2d 739, 759 (Mo. banc 1982), *cert. denied*, 459 U.S. 1188 (1983). Under *State v. Griffin*, the existence of one of the *Preston* factors is mandatory. *See, State v. Griffin*, 756 S.W.2d at 489-490. In respondent's direct appeal, the Missouri Supreme

Court found depravity of mind on the basis of his torture of Mansfield Dave or on the basis of his mutilation of the corpse (App. 150). Both findings are *Preston* factors, *State v. Preston*, 673 S.W.2d at 11. The fact that the Missouri Supreme Court made an alternative finding is irrelevant. The court's finding of one of those factors supports the "depravity of mind" finding under *State v. Griffin*.

Since the Missouri Supreme Court applied a limiting construction of the "depravity of mind" statutory aggravating circumstance in that it found either torture or mutilation of the corpse, the "depravity of mind" statutory aggravating circumstance is constitutional as applied. The statutory aggravating circumstance culls respondent from the pool of Missouri capital murderers and makes respondent eligible for the imposition of the death penalty. This form of analysis is the form contemplated by the Court in *Godfrey*. The Court should issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit due to the significance of the Court's opinion to Missouri and the other capital punishment states in the circuit.

II.

THE FEDERAL COURTS SHOULD NOT REVIEW UNDER THE DUE PROCESS CLAUSE THE PROPRIETY OF A PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT SINCE THE DUE PROCESS CLAUSE DID NOT DICTATE THE GRANT OF RELIEF WHEN RESPONDENT'S CONVICTION BECAME FINAL, AND IF FEDERAL-COURT REVIEW IS APPROPRIATE, THE PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT DID NOT VIOLATE RESPONDENT'S DUE PROCESS RIGHTS.

The Court of Appeals also affirmed the judgment of the district court on the basis that respondent's due process rights were violated by the prosecutor's penalty-phase closing argument (App. 18-26).[1] Petitioner submits that the Court of Appeals improperly reviewed the merits of respondent's claim because such review created "new law" that should not be applied retroactively under *Teague v. Lane*, 109 S.Ct. 1060 (1989).

The Court of Appeals recognized the significance of the *Teague* issue with the statutory aggravating-circumstance claim (App. 9-14), *citing*, *Teague v. Lane*, 109 S.Ct. at 1060; *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989); *Bruner v. Perini*, 875 F.2d 531 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 334 (1989); *Sawyer v. Brown*, 881 F.2d 1273 (5th Cir. 1989) (en banc). The court, however, overlooked the need for discussion of the *Teague* issue with the closing-argument due process claim.

Since the Court of Appeals did not find an Eighth Amendment violation with the prosecutor's penalty-phase closing argument (App. 21 n. 9), *cf. Sawyer v. Butler*,

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[1] The prosecutor's penalty-phase closing argument is reprinted in the Appendix at App. 26-36.

881 F.2d at 1273 (declining to review a claim arising from *Caldwell v. Mississippi*, 472 U.S. 320 (1985), under *Teague* principles), petitioner will address only whether the Fourteenth Amendment due process analysis should be applied retroactively.

As the Court of Appeals noted, it must consider retroactivity as a threshold issue (App. 9, *citing*, *Teague v. Lane*, 109 S.Ct. at 1060). Under *Teague*, the court cannot announce a new rule of law in a given case unless that rule would be applied retroactively (App. 9, *citing*, *Teague v. Lane*, 109 S.Ct. at 1078). A new rule is one that "breaks new ground or imposes a new obligation on the States or the Federal Government" (App. 10, *quoting*, *Teague v. Lane*, 109 S.Ct. at 1075). Alternatively, "to put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final" (App. 10, *quoting*, *Teague v. Lane*, 109 S.Ct. at 1070). Petitioner respectfully submits that the Court of Appeals' analysis with the penalty-phase closing-argument claim was not "dictated" at the time respondent's conviction became final. Petitioner respectfully submits that the Court of Appeals has created new law and applied it retroactively, in violation of *Teague*.

To support its analysis that there was a due process violation at the penalty-phase closing argument, the Court of Appeals cited the following cases:

Caldwell v. Mississippi, 472 U.S. 320 (App. 19);

Hamilton v. Nix, 809 F.2d 463 (8th Cir.) (en banc), *cert. denied*, 483 U.S. 1023 (1987) (App. 21);

Darden v. Wainwright, 477 U.S. 168 (1986) (App. 21);

Moore v. Wyrick, 760 F.2d 884 (8th Cir. 1985) (App. 21);

Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986), *cert. denied*, 480 U.S. 911 (1987) (App. 22);

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), *vacated on other grounds*, 478 U.S. 1016 (1986) (App. 22);

Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986), *cert. denied*, 482 U.S. 909 (1987) (App. 22);

Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (App. 25).

Respondent's conviction became final on October 4, 1982 (App. 13). Each case cited by the Court of Appeals was decided after respondent's conviction became final. The law those cases created should not have been applied retroactively by the Court of Appeals.

Further, since cases decided in other circuits do not "dictate" the law in the United States Court of Appeals for the Eighth Circuit or in the Missouri state courts, *cf. State v. Kelly*, 753 S.W.2d 71, 72-73 (Mo.App., S.D. 1988), the law decided in those cases from the other circuits should not be applied retroactively by the United States Court of Appeals for the Eighth Circuit. Since the law from the United States Court of Appeals for the Eighth Circuit does not "dictate" the interpretation of federal constitutional law by the Missouri state courts, *State v. Kelly*, 753 S.W.2d at 72-73, *Hamilton* and *Moore* should not be applied retroactively. "[The Missouri state courts] are bound by the decisions of the United States Supreme Court. We need not follow lower federal courts." *State v.*

Kenley, 693 S.W.2d 79, 82 (Mo. banc 1985), *cert. denied*, 475 U.S. 1098 (1986). Petitioner submits that the Missouri state courts' interpretations of federal constitutional law are not dictated by the United States Court of Appeals for the Eighth Circuit or any other United States courts of appeals. Only the United States Supreme Court dictates the Missouri state courts' interpretations of federal constitutional law.

Accordingly, the issue becomes whether the law from the United States Supreme Court "dictated" the Court of Appeals' ruling concerning the prosecutor's penalty-phase closing argument (App. 18-26) at the time respondent's conviction became final on October 4, 1982. Of course, the two Supreme Court cases cited by the Court of Appeals, *Caldwell* (App. 19) and *Darden* (App. 21), were decided after respondent's conviction and sentence became final. Respondent can seek no support from either of those cases. The issue thus becomes whether the case the Court of Appeals did not cite, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *quoted in*, *Darden v. Wainwright*, 477 U.S. at 181, "dictated" the analysis of the Court of Appeals' September 18, 1989 opinion.[2]

Initially, petitioner submits that *Donnelly* does not dictate the result; otherwise, the Court of Appeals would have cited the case as precedent. Second, *Donnelly v. DeChristoforo* and *Darden v. Wainwright* refer only to guilt-phase closing arguments, not to penalty-phase closing arguments. The United States Supreme Court has not

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[2] Indeed, the only due process case cited by this Court in *Darden* was *Donnelly*.

issued any opinion concerning penalty-phase closing arguments. Since this Court has been silent concerning penalty-phase closing arguments, petitioner does not believe that the result in the present case has been "dictated" by the United States Supreme Court.[3] This Court has not authorized any due process review of penalty-phase closing arguments. If this Court believes that due process review of penalty-phase closing arguments is required, it can manifest that belief by granting certiorari in a direct-appeal case. *Compare, Walton v. Arizona*, 110 S.Ct. 49 (1989), *with Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc), *petition for certiorari filed*, 57 U.S.L.S. 3655 (U.S., Apr. 4, 1989) (No. 88-1553).

Petitioner notes the sophisticated form of due process analysis used by the various courts of appeal. *See, Wilson v. Kemp*, 777 F.2d 621, 623 (11th Cir. 1985), *cert. denied*, 476 U.S. 1153 (1986); *Brooks v. Kemp*, 762 F.2d 1383, 1403 (11th Cir. 1985) (en banc), *vacated on other grounds*, 478 U.S. 1016 (1986), *aff'd*, 809 F.2d 700 (1987), *cert. denied*, 483 U.S. 1010

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[3] An example illustrates: The Court reserved the question of whether the Double Jeopardy Clause concepts of *Bullington v. Missouri*, 451 U.S. 430 (1981), apply to the noncapital sentencing proceedings in *Lockhart v. Nelson*, 109 S.Ct. 285, 289 n. 6 (1988). Accordingly, the application of the Double Jeopardy Clause to noncapital sentencing proceedings is not dictated by current law. *Compare, French v. Estelle*, 692 F.2d 1021 (5th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983), *with Denton v. Duckworth*, 873 F.2d 144, 146-148 (7th Cir.), *cert. denied*, 110 S.Ct. 341 (1989), and *Sailor v. Scully*, 836 F.2d 118, 123 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 2002 (1988). For *Teague* purposes, it should not matter whether the Court declines review by footnote or by denial of certiorari.

(1987); *Coleman v. Brown*, 802 F.2d at 1239. Until the present case, the United States Court of Appeals for the Eighth Circuit has not had an opportunity either to accept or reject the analysis of the other courts of appeals. That form of analysis – best illustrated by *Brooks* – is not "dictated" by the Due Process Clause. Neither petitioner, respondent, nor the Court of Appeals knows whether this Court will accept or reject the *Brooks* analysis or develop some hybrid. Accordingly, petitioner respectfully submits that the result of the Court of Appeals was not "dictated," as required by the retroactivity analysis of *Teague*.

Petitioner suggests that the result was not "dictated" by *Donnelly*, as manifested by the rulings of the various Missouri state courts. Neither the Missouri Supreme Court, the Missouri Court of Appeals nor the St. Louis County Circuit Court found constitutional error with the closing argument. Petitioner believes that this, in and of itself, demonstrates that the result was not "dictated" at the time the conviction became final.

Finally, as demonstrated by the condemnation of the prosecutor's penalty-phase closing argument by the lower courts, *see, Darden v. Wainwright*, 477 U.S. at 179, the prosecutor's closing argument presents a variety of penalty-phase closing-argument issues for the Court to consider. Petitioner believes that the diversity of guilt-phase closing-argument errors in *Darden* justified the Court's grant of review in the *Darden* case. *See, Darden v. Wainwright*, 477 U.S. at 179 nn. 5-12. The same situation exists in the present case. The courts below found a variety of errors with the prosecutor's penalty-phase closing argument. Although none of the putative errors rise to the level of error considered in *Darden*, the lower

courts granted relief. The present case presents an excellent opportunity for this Court to review the penalty-phase closing argument – an issue that has arisen in almost every circuit court and, more importantly, in every state court – and to determine the federal constitutional parameters for closing arguments.

There are over two thousand prisoners currently on "death rows" in the United States. This Court needs to provide guidance for the state courts' and federal courts' review of penalty-phase closing arguments. The present case provides an excellent opportunity for such a review and determination that respondent's due process rights were not violated by the prosecutor's penalty-phase closing argument.

CONCLUSION

Petitioner respectfully requests that the petition for a writ of certiorari be granted and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-2385WM

Rayfield Newlon,	*	
	*	
Appellee,	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Missouri
William Armontrout,	*	
	*	
Appellant.	*	

Appellant's petition for rehearing has been considered by the court and is denied.

November 15, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

Rayfield NEWLON, Appellee,

v.

William ARMONTROUT, Appellant.

No. 88-2385.
United States Court of Appeals,
Eighth Circuit.

Submitted June 14, 1989.

Decided Sept. 18, 1989.

Rehearing Denied Nov. 15, 1989.

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

The State of Missouri appeals from the district court's[1] order granting Rayfield Newlon's 28 U.S.C. § 2254 petition for writ of habeas corpus, vacating Newlon's death sentence, and ordering the State to either resentence Newlon to life imprisonment without parole for fifty years or grant him a new penalty phase trial. *See Newlon v. Armontrout*, 693 F.Supp. 799 (W.D.Mo. 1988). We conclude that the State's arguments alleging error on the part of the district court do not warrant a reversal of the district court's grant of habeas relief. Accordingly, we affirm the district court's order.

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[1] The Honorable Scott O. Wright, Chief Judge of the United States District Court for the Western District of Missouri.

I.

On the night of April 24, 1978, Mansfield Dave, the proprietor of a family-owned convenience store in Kinloch, Missouri, was killed while working alone in the store. Although no one witnessed the murder, Dave's wife saw a young man (later identified as Franz Williams) as she was running to the store from the nearby Dave house in response to the alarm. She noted that the young man appeared empty handed. When Mrs. Dave arrived at the convenience store, she found Mr. Dave lying dead behind the counter with two bullet wounds in his upper body – one in the upper left chest and the other in the upper left shoulder. When the police investigated the scene, they found two spent 16-gauge shotgun shells, which police later identified as coming from a sawed-off shotgun that they traced to Walter West's house. Police also found a cold bottle of Nehi orange soda bearing Williams' fingerprints sitting on the counter.

The evidence linked three individuals to Mr. Dave's murder: Franz Williams, Walter West and Rayfield Newlon. Franz Williams was initially charged with capital murder, but pled guilty to felony murder. Walter West pled guilty to second degree murder and received a recommended prison term of ten years in an out-of-state penitentiary in exchange for his testimony at Rayfield Newlon's trial. Rayfield Newlon was tried by a jury, convicted of capital murder and sentenced to death.

An indictment filed August 4, 1978, charged petitioner Newlon with capital murder "in that [Newlon], acting with others, feloniously, unlawfully, willfully, knowingly, and deliberately and with premeditation,

killed Mansfield Dave." *See* Mo.Rev.Stat. § 565.001 (1978). The evidence connecting petitioner with the crime consisted of Walter West's testimony and statements petitioner made to police while he was in custody.[2]

At the close of the evidence, instructions, and arguments of counsel, the jury found petitioner guilty of capital murder. Mo.Rev.Stat. § 565.001 (1978). Neither side offered any additional evidence at the penalty phase of the trial, which was held the morning after the jury

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[2] Prior to his conviction, petitioner made three conflicting statements regarding his involvement in the murder. In an initial statement to the police, he admitted to helping West and Williams saw off a shotgun and to going with them to the convenience store intending to rob it. He contended, however, that he had stayed in the car while West and Williams went inside. In a later statement which was videotaped by the police, petitioner admitted that he had entered the convenience store with Williams, but alleged that Williams had done the shooting while petitioner was at the back of the store. In this statement, petitioner also asserted that, before entering the store, Williams had expressed the possibility that he "might have to shoot" Mr. Dave because he knew him. In petitioner's testimony during the guilt phase of his trial, he denied being present at the scene and denied killing Mr. Dave.

Walter West testified at trial that Williams came from the back of the store just as petitioner was at the counter "messing around with the shotgun." According to West, who stated that he observed the incident from his vantage point sitting in his automobile parked in a lot across the street from the store (the entryway of which was approximately five feet below street level), when Mr. Dave turned around there were two consecutive "puffs of smoke," and then Williams and petitioner fled from the store. West quoted petitioner as reporting to him later that "I had to burn him." Williams did not testify at the trial.

returned its guilty verdict. Both the prosecutor and petitioner's trial counsel argued during the penalty phase, and the trial court gave additional instructions to the jury, which returned a sentence of death.

The Missouri Supreme Court affirmed Newlon's conviction and sentence on direct appeal. *State v. Newlon*, 627 S.W.2d 606 (Mo.)(en banc), *cert. denied*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982). After his conviction was affirmed, petitioner filed a motion to vacate his sentence pursuant to Missouri Supreme Court Rule 27.26.[3] After an evidentiary hearing at which petitioner presented additional evidence, a St. Louis County circuit court denied Newlon's 27.26 motion. The Missouri Court of Appeals affirmed the denial of the 27.26 motion and denied a request for a rehearing or transfer to the Missouri Supreme Court. *Newlon v. State*, 705 S.W.2d 590 (Mo.App. 1986).

Having exhausted his available state remedies, Newlon commenced the present action for federal habeas corpus relief in federal district court, challenging the imposition of the death penalty. Newlon advanced the claims that: (1) he was denied due process of law due to the improper nature of the prosecutor's penalty phase argument, which was not only inflammatory and prejudicial, but also diminished the jury's sense of responsibility in imposing the death penalty; (2) he was denied his right to effective assistance of counsel during the penalty phase of the trial; (3) the trial court unconstitutionally

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[3] Rule 27.26 was repealed effective January 1, 1988. Postconviction relief in Missouri is now available under Missouri Supreme Court Rule 29.15.

limited the factors the jury could consider in mitigation of the death penalty; and (4) Missouri's "depravity of mind" instruction on aggravating circumstances was unconstitutionally vague.

The district court, after an additional hearing, found a constitutional violation in each instance advanced by Newlon and granted the writ.[4] The district court opinion addressed each of Newlon's claims on its merits. In an order dated June 2, 1988, the district court directed that Newlon be given a new penalty phase trial or, in the event that the State chose not to give Newlon a new trial, that he be relieved of the sentence of death and imprisoned for life with no opportunity of parole for fifty years. *Newlon v. Armontrout*, 693 F.Supp. 799 (W.D.Mo. 1988).

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[4] We note, for purposes of clarity, that the district court did not find the Missouri aggravating circumstance statute facially invalid. Rather, the court found that Newlon's death sentence was unconstitutional because the state trial court's application of the statute was arbitrary and capricious. *Newlon v. Armontrout*, 693 F.Supp. 799, 813 (W.D.Mo. 1988). As the district court noted, "[a]lthough the Supreme Court has not held such language to be facially unconstitutional, it has 'not stopped at the face of the statute but [has] probed the application of statutes to particular cases.' " *Id.* at 812 (citations omitted). The court went on to hold that "[a]bsent a clear, limiting directive, the words 'depravity of mind' in this case are not capable of objective determination." *Id.* at 813. (similarly, we do not find the Missouri aggravating circumstance unconstitutional on its face, but find Newlon's death sentence unconstitutional based on the state trial court's unconstitutional application of the statute.

For reversal, the State of Missouri argues that the district court erred in finding Missouri's aggravating circumstance instruction vague because the Missouri Supreme Court has defined "depravity of mind" in such a way as to narrow the sentencer's discretion. The State also contends that the prosecutor's penalty phase closing argument was proper and not prejudicial because there is no reasonable probability that it affected the outcome of the penalty phase. We address each of these arguments in turn.[5]

II.

The verdict form returned by the jury when they imposed the death penalty indicated only that the jury found "Aggravating Circumstance No. 2" in "Instruction No. 19." Instruction No. 19 required the jury to find one of two aggravating circumstances before returning a verdict of death:

> 1. Whether the Defendant murdered Mansfield Dave for the purpose of receiving money or any other thing of monetary value.
>
> 2. Whether the murder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman.

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[5] The State also challenges the district court's finding of ineffective assistance of counsel at the penalty phase. Because we base our affirmance on the first two issues, however, we need not address the effectiveness of trial counsel.

The instruction was based on Mo.Rev.Stat. § 565.012.2(7) (1978), which provides for a statutory aggravating circumstance if the "offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."[6] Because the death sentence would fail if the single aggravating circumstance was invalid, the district court focused on the validity of the phrase "depravity of mind." The district court found that "[a]bsent a clear, limiting directive, the words 'depravity of mind' in this case are not capable of objective determination." 693 F.Supp. at 812-13. The court relied on standards set forth in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)(plurality opinion), and that case's progeny in holding the instruction unconstitutionally vague. 693 F.Supp. at 813.

On appeal, the State claims that the district court erred in finding the "depravity of mind" instruction unconstitutionally vague. The State submits that the instruction adequately channeled the jury's discretion in considering the death penalty because the Missouri Supreme Court construes "depravity of mind" narrowly. In response, Newlon focuses on the trial court's failure to define "depravity of mind" for the jury, alleging that the jury was not given adequate information and guidance from clear and objective standards to decide the existence of aggravating circumstances. Newlon also takes issue with the State's claim that the Missouri Supreme Court has defined the scope of the phrase "depravity of mind."

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[6] Section 565.012.2(7) was replaced by Mo.Rev.Stat. § 565.032.2(7) (1988).

A.

Before we address the constitutionality of the "depravity of mind" instruction, we must consider as a threshold issue whether the rule adopted by the district court and urged on us by Newlon is a "new rule" for purposes of retroactivity. *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion by Justice O'Connor, with Chief Justice Rehnquist, Justice Scalia and Justice Kennedy joining in the opinion, and Justices Stevens and Blackmun concurring in the judgment) (requiring courts to determine retroactivity as threshold matter in cases on collateral review); *see Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *Bruner v. Perini*, 875 F.2d 531 (6th Cir. 1989). Under *Teague*, we cannot "announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated." 109 S.Ct. at 1078. The *Teague* plurality adopted a new retroactivity approach which precludes us from announcing or applying a new constitutional rule of criminal procedure in a case on collateral review unless the case falls within one of two exceptions. *Id.* 109 S.Ct. at 1075, 1978.

Teague involved the appeal of a district court's denial of a writ of habeas corpus. The petitioner challenged his conviction on the ground that the prosecutor had used all of his peremptory challenges to exclude blacks from the jury, resulting in an all-white jury. The petitioner argued that the equal protection clause of the fourteenth amendment and the fair cross-section requirement of the sixth amendment prohibited the exclusion of petit jurors on the basis of race. The Court rejected the petitioner's equal

protection claim, based on *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) (per curiam), because petitioner's conviction became final before *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was decided. The Court did not rule on the merits of petitioner's sixth amendment claim because a decision applying the rule that the jury venire be drawn from a fair cross-section of the community to the petit jury would not apply retroactively to cases on collateral review.

The plurality held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 109 S.Ct. at 1075. The Court defined a new rule as one which "breaks new ground or imposes a new obligation on the States or the Federal Government," or, "[t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 1070 (emphasis in original). The Court identified two exceptions to the general rule of non-retroactivity. First, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " *Id.* at 1075, *quoting Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1160, 1180, 28 L.Ed.2d 404 (1971) (Separate opinion of Harlan J.). Second a new rule should be applied retroactively if it requires the observance of "procedures without which the likelihood of an accurate conviction is seriously diminished." *Id.* 109 S.Ct.

at 1075, 1076-77.[7] Applying this retroactivity approach to the facts in *Teague*, the Court held that application of the fair cross-section requirement to the petit jury would be a new rule which, because it did not fall within an exception, would not apply retroactively to cases on collateral review. 109 S.Ct. at 1075-77.[8]

Although the plurality opinion in *Teague* did not decide whether this new retroactivity approach would apply in the capital sentencing context, a recent Supreme Court case extended the *Teague* approach to capital cases. *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). *Penry* addressed two questions:

> First, was Penry sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them? Second, is it cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry's reasoning ability?

109 S.Ct. at 2943-44.

With respect to the first issue, relating to the jury's ability to give effect to mitigating evidence in deciding

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[7] We need not address the application of these exceptions in *Newlon*, as we find that the rule is not a "new rule" for retroactivity purposes.

[8] The "new rule" aspect of *Teague* is extensively analyzed en banc in *Sawyer v. Butler*, 881 F.2d 1273 (5th Cir. (La.), 1989) (1989 W.L. 90696).

whether to impose the death penalty, the Court found that the rule sought by Penry was not a "new rule" under *Teague*. After discussing *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (upholding the Texas death penalty statute as valid on its face), the *Penry* Court concluded that Penry merely asked the State "to fulfill the assurance upon which *Jurek* was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." 109 S.Ct. at 2945. Furthermore, Supreme Court precedent in effect at the time Penry's conviction became final clearly mandated that a state could not prevent a sentencer from considering evidence relevant to the defendant's background or character or to circumstances of the offense that militate against imposing the death penalty. *Id.* at 2946. The *Penry* Court therefore reached the merits of the first issue.

In contrast, the *Penry* Court found that the second question, regarding the constitutionality of executing a mentally retarded person with Penry's reasoning ability, presented a potential "new rule." 109 S.Ct. at 2952. Such a rule was not dictated by existing precedent and would impose a new obligation on the States and Federal Government. *Id.* The Court found, however, that such a rule would fall under the first exception to the general rule of nonretroactivity because it would prohibit "a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 2953. Accordingly, the Court addressed the merits of Penry's second claim.

The first rule sought by Newlon and opposed by the State is that the imposition of the death penalty in this

case, based on the jury's finding that the murder was "outrageously or wantonly horrible, or inhuman in that it involved depravity of mind," did not "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' " for purposes of *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980) (plurality opinion), *quoting Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976). The rule in question is not a "new rule" under *Teague* and *Penry* because it is dictated by case law existing at the time Newlon's conviction became final.

Newlon's conviction became final on October 4, 1982, when the United States Supreme Court denied his petition for certiorari on direct review of his conviction and sentence. *Newlon v. Missouri*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982); *see Penry*, 109 S.Ct. at 2944 (conviction became final when Supreme Court denied review). *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion), were rendered before Newlon's conviction became final. This court views *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), as an application, not an expansion, of *Godfrey*. *See Mercer v. Armontrout*, 864 F.2d 1429 (8th Cir.1988), *stay denied*, ___ U.S. ___, 109 S.Ct. 773, 102 L.Ed.2d 766 (1989) (*Mercer II*). Newlon is therefore entitled to the benefit of those decisions.

Because our decision on the constitutionality of the "depravity of mind" instruction is based on precedent existing at the time Newlon's conviction became final, any rule we announce in this case will be applied retroactively to Newlon and to others similarly situated. *Teague*

109 S.Ct. at 1078. Therefore, we shall address the merits of Newlon's first claim.

B.

Claims of vagueness directed at statutory aggravating circumstances in capital punishment statutes characteristically assert that the challenged provision fails adequately to inform the jury when it must impose the death penalty, leaving the jury with the kind of unfettered discretion held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). "[T]he, channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Cartwright*, 108 S.Ct. at 1858 (citations omitted). We analyze such challenges under the eighth amendment. *Id.*

In *Godfrey*, the Supreme Court held unconstitutionally vague a death sentence which was based on the jury's finding that the offense committed was "outrageously or wantonly vile, horrible or inhuman." The *Godfrey* Court held that, to authorize capital punishment, a state must "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. * * * It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " 446 U.S. at 428, 100 S.Ct. at 1764-65 (citations omitted). Because the channeling function of an aggravating circumstance requires an objective determination by the

sentencer, an aggravating circumstance must be described in "terms that are commonly understood, interpreted and applied." *Cartwright v. Maynard*, 822 F.2d 1477, 1485 (10th Cir. 1987), *aff'd*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Otherwise, a standard may be so vague that it would " 'fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furnam [v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] could occur.' " *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983), *quoting Gregg v. Georgia*, 428 U.S. 153, 195 n. 46, 96 S.Ct. 2909, 2935 n. 46, 49 L.Ed.2d 859 (1976). As the Tenth Circuit recognized in *Cartwright*, " 'if an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibility to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die.' " 822 F.2d at 1485, *quoting* Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases – The Standardless Standard*, 64 N.C.L.Rev. 941, 954 (1986).

The record in this case specifically shows that the jury did not know what the phrase "depravity of mind" meant. During penalty phase deliberations, the jury asked the court to define the phrase, but the court advised the jury that it could not give them further instructions. This refusal to clarify the term "depravity of mind" when the jury plainly did not understand the meaning of the phrase and actually sought a limiting directive left the jury free to administer the statute "in an

arbitrary and unpredictable fashion." *See California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). Absent a clear, limiting directive, the words "depravity of mind" in this case are not capable of objective determination. As in *Godfrey*, "nothing in these few words, standing alone, * * * implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 446 U.S. at 428, 100 S.Ct. at 1765.

This court considered the "depravity of mind" statutory aggravating circumstance at issue here in *Mercer II*. In *Mercer II*, we found *facially* valid an instruction requiring the jury to determine that "the murder * * * involved depravity of mind and that as a result thereof it was outrageously or wantonly vile and inhuman." 864 F.2d at 1435 n. 4. We found that the state appellate court's review of the issue satisfied the requirements of *Godfrey*. In an earlier case, however, the Missouri Supreme Court had made a specific finding that " '[d]epravity of mind' is demonstrated in this case by the mode of killing preceded by extended sexual and psychological abuse of the victim." *State v. Mercer*, 618 S.W.2d 1, 11 (Mo.) (en banc), *cert. denied*, 454 U.S. 933, 102 S.Ct. 432, 70 L.Ed.2d 240 (1981) (*Mercer I*). There is no such specific finding in the current case. Furthermore, *Mercer II* did not fully discuss the implications of *Cartwright* because the *Mercer I* jury found two aggravating circumstances, not just one. 864 F.2d at 1435-36 n.5.

In *Cartwright*, both the Tenth Circuit and the Supreme Court determined that a death sentence was invalid that a death sentence was invalid where the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of "especially heinous, atrocious or cruel." 108 S.Ct. at 1859. The state appellate court's description of the events surrounding the murder and conclusion that those events "adequately supported the jury's finding" did not provide a proper narrowing construction. *Id.* The same situation is present here.

The State argues that consistent with *Godfrey* the constitutional issue is not how an aggravating circumstance instruction is understood by the jury, but whether it is construed and applied properly by the state appellate court in its independent review of a petitioner's sentence. The language of *Godfrey* and its progeny, however, implies that the discretion of the *sentencing body* must be properly channeled. Even assuming that the Missouri Supreme Court *could* have cured the defect in the instructions by imposing a narrow construction of the "depravity of mind" circumstance on review, we find that the construction applied by the Missouri court in this case did not sufficiently narrow the class of persons eligible for the death penalty.

The State's argument that the Missouri courts applied a limiting construction of the statutory aggravating circumstance is based on two post-*Newlon* Missouri cases: *State v. Preston*, 673 S.W. 2d 1 (Mo.) (en banc), *cert. denied*, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984), and *State v. Griffin*, 756 S.W.2d 475 (Mo. 1988) (en banc), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3175, 104 L.Ed.2d 1036 (1989). In *Preston*, the Missouri Supreme Court listed

factors to be considered in determining "depravity of mind." The *Preston* court specifically noted that a precise definition of "depravity of mind" had not yet been adopted in Missouri. 673 S.W.2d at 11. In *Griffin*, the Missouri court specifically required that the jury find one of the *Preston* factors before finding "depravity of mind." 756 S.W.2d at 490. We find nothing in the Missouri Supreme Court direct review of *Newlon*, however, to indicate that the court applied the limiting construction adopted in *Preston* and *Griffin* to *Newlon*. The Missouri Supreme Court basically just recited the facts, then concluded that "the record supports the finding of depravity." *State v. Newlon*, 627 S.W.2d at 622.

After reviewing the entire record, we agree with the district court that the "depravity of mind" instruction was not capable of objective determination by the jury in this case, and that the Missouri Supreme Court did not provide a limiting construction of the term sufficient to satisfy the eighth amendment requirements of *Godfrey* and *Cartwright*.

III.

The State also challenges the district court's findings that the prosecutor's argument during the penalty phase of Newlon's trial was improper. The State argues that the district court applied the wrong standard of review, that none of the statements made by the prosecutor during his argument were improper, and that even if some of the statements were improper, they do not rise to the level of constitutional error.

A.

In *Newlon*, the district court used a three-part analysis in reviewing the prosecutor's closing argument. First, the district court addressed petitioner's argument that the jurors were subjected to an argument based on fear, premised on facts not in evidence, and calculated to inflame the jury and remove reason from the sentencing process. In this section, the district court addressed statements in which the prosecutor (1) expressed his personal belief in the propriety of the death sentence and implied that he had special knowledge outside the record; (2) emphasized his position of authority as prosecuting attorney of St. Louis County; (3) attempted to link petitioner with several well-known mass murderers; (4) appealed to the jurors' personal fears and emotions; and (5) asked the jurors to "kill him now. Kill him now." 693 F.Supp. at 804-806. As part of this analysis, the district court set forth portions of the prosecutor's argument and analyzed the propriety of each statement.

After considering the propriety of each of the several challenged remarks, the district court addressed the issue of whether the prosecutor, by his remarks, and the Missouri state trial court, by its failure to give a curative instruction, diminished the jury's sense of responsibility in imposing the death penalty. These are eighth amendment claims, and the district court correctly used an eight amendment analysis in determining their propriety. *See Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (holding that remarks by prosecutor in a capital case that misinformed the jury as to the role of appellate review violated the eighth amendment).

Finally, the district court examined the totality of the circumstances in the penalty proceeding:

> In examining the totality of circumstances in the penalty proceeding, this Court is cognizant that defense counsel made no objections and failed to rebut the improper and misleading statements. Moreover, the trial judge made no comments *sua sponte* and issued no curative instructions. The prosecutor's rhetoric continued uninterrupted, and by silence, apparently sanctioned by the trial judge. Although *Donnelly [v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)] 'warns against holding every improper and unfair argument of a state prosecutor to be a federal due process violation, it does not insulate all prosecutorial comments from federal constitutional objections.' *Caldwell*, [472 U.S. at 338,] 105 S.Ct. at 2644.

693 F.Supp. at 808. The court went on to enumerate the factors leading to the finding that the penalty phase trial was fundamentally unfair:

> Here, the prosecutor's misleading comments concerning his personal belief that this case deserved the death penalty more than any other in ten years, the prosecutor's emphasis on his authority as the 'top law enforcement officer of the County,' the comparison to infamous mass-murderers, the personalized analogy to the jurors' self-defense of their own children, the references to war and courage, the insinuation that all murders should be punished with death, and the reassurance that appellate review would follow if a death sentence were rendered, *all combined to infect the penalty proceeding with an unfairness that violates due process.*

Id. (emphasis added).

In analyzing the prosecutor's closing remarks, we must apply the standard articulated by this court in *Hamilton v. Nix*, 809 F.2d 463 (8th Cir.) (en banc), *cert. denied*, 483 U.S 1023, 107 S.Ct. 3270, 97 L.Ed.2d 768 (1987).[9] As this court has recognized, in a section 2254 habeas corpus proceeding, a federal court's review of alleged due process violations stemming from a state court conviction is narrow. *Id.* at 470. Not every trial error that might result in reversal of a federal conviction on direct appeal would mandate the same result in section 2254 review of a state court conviction, where we may consider only errors of constitutional magnitude. *See Darden v. Wainwright*, 477 U.S. 168, 182-83, 106 S.Ct. 2464, 2472, 91 L.Ed.2d 144 (1986). The petitioner must show that the alleged improprieties were "so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair." *Moore v. Wyrick*, 760 F.2d 884, 886 (8th Cir. 1985). Under this standard, a petitioner must show that there is

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[9] Because we find the closing argument, when viewed in its entirety, violates due process, we need not address Newlon's eighth amendment *Caldwell* claims and the implication of the recent Supreme Court case of *Dugger v. Adams*, ___ U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989) (Supreme Court decision in *Caldwell*, which occurred *after* petitioner's conviction became final, did not provide cause for his procedural default (failure to object at trial) where state common law rules forbidding jury arguments which would mislead the jury regarding the importance of its decision were in effect when petitioner's conviction became final; therefore, court refused to reach merits of petitioner's *Caldwell* claim on habeas review). There is prejudice enough without relying on the *Caldwell* claims articulated by the district court.

a "reasonable probability that the error complained of affected the outcome of the trial – i.e., that absent the alleged impropriety, the verdict probably would have been different." *Hamilton*, 809 F.2d at 470; *see Tucker v. Kemp*, 802 F.2d 1293, 1295-96 (11th Cir.1986), *cert. denied*, 480 U.S. 911, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987).

We cannot agree with the State's argument that the district court's use of both eighth amendment and fourteenth amendment analysis somehow renders its decision improper. Rather, we find that the eighth amendment analysis bolstered the district court's finding of a due process violation. As the Tenth Circuit has stated, "[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances, *see Brooks v. Kemp*, 762 F.2d 1383, 1406 (11th Cir. 1985) (en banc), *vacated on other grounds*, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law, *see Darden*, [477] U.S. [at 182-83], 106 S.Ct. at 2472," *Coleman v. Brown*, 802 F.2d 1227, 1239 (10th Cir. 1986), *cert. denied*, 482 U.S. 909, 107 S.Ct. 2491, 96 L.Ed.2d 383 (1987).

B.

The State focuses its argument on appeal on the perceived lack of prejudice analysis in the district court's opinion. In its brief, the State contends that the court "must look to see if the prosecutor cured his error, whether defense counsel cured the error, or whether the

instructions cured the error by properly instructing the jury," Appellant's Brief at 22,[10] and complains that the district court erred when it performed this complex analysis in a "mere three sentences." We find the district court's discussion sufficient. With respect to each portion of the prosecutor's argument that the district court found erroneous, the court gave a detailed and well-supported analysis of why a particular statement was improper. *See Newlon*, 693 F.Supp. at 804-08. As is apparent in reviewing the transcript of the prosecutor's argument, the argument is filled with improper statements.[11] Considered in its entirety, the prosecutor's argument is obviously improper and prejudicial.

There is no evidence of any attempt by the prosecutor to cure his error. It is also clear that the defense counsel did not cure the prosecutor's error, either by

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[10] The State suggested, at oral argument, that if a court finds one of the prosecutor's sentences to be erroneous, then it should measure what type of prejudice arose from the prosecutor's argument. Then it should examine what the defense counsel did in his argument to minimize the prejudice. Then it should review the jury instructions to see if the jury was properly instructed in the case, and then take into account all the aggravating and mitigating information to determine whether there is a reasonable probability that the outcome of the sentencing phase would have been different. We agree with this method of analysis articulated by the State. Our review of the entire sentencing proceeding leads us to conclude that the prosecutor's penalty phase argument did indeed prejudice Newlon.

[11] The prosecutor's argument is reproduced in its entirety as an appendix to this opinion.

objecting during the prosecutor's argument or by statements made by the defense counsel during his own penalty phase argument. As the district court stated, "defense counsel made no objections and failed to rebut the improper and misleading statements." *Id.* at 808.

With respect to curing the error by jury instruction, the trial judge made not comment *sua sponte* to the jury and issued no curative instruction after the closing argument was completed. The State's argument that the standard jury instruction that statements made by counsel during opening and closing argument are not evidence cures any error made by the prosecutor is without merit. Such a broadly sweeping rule would permit *any* closing argument, no matter how egregious.

Because we find that the prosecutor's closing argument improper, and because we agree with the district court that impropriety was not cured by the prosecutor, the defense attorney or the court, we must examine the totality of the circumstances to determine whether there is a reasonable probability that error complained of affected the outcome of the penalty phase. *See Hamilton*, 809 F.2d at 470.

In contending that there was no prejudice, the State argues that the overwhelming evidence of Newlon's guilt should satisfy any further inquiry necessary to evaluate the degree of prejudice. The State cites *Brooks v. Kemp* in support of this proposition. In *Brooks*, the defendant admitted to rape, armed robbery, kidnapping and murder, and was convicted of all of those charges. The murder was preceded by both physical and psychological abuse, and the victim was left to slowly bleed to death at

the side of the road. Most importantly, there was no doubt but that the petitioner in *Brooks* actually committed the murder. In *Newlon*, however, the jury never expressly found that Newlon fired the shot that killed Mansfield Dave. The jury deliberated for eight hours before arriving at a guilty verdict. The jury was instructed at the guilt phase that is was not necessary to find that Newlon was the actual murderer before convicting him of capital murder. At the penalty phase of the trial, the jury had to evaluate the evidence as it pertained to the two possible aggravating circumstances: "whether the defendant murdered Mansfield Dave for the purpose of receiving money * * *" and "whether the murder of Mansfield Dave involved depravity of mind * * *." If the jury had believed that Newlon had murdered Dave, rather than simply "had the frame of mind that's consistent with pulling the trigger," it would have been a simple matter to find the existence of the first aggravating circumstance – but the jury acquitted him of that circumstance. The facts implicating Newlon are no more overwhelming than those in *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985), *cert denied*. 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 738 (1986):

> The state's case against Drake was made almost completely by [the] co-defendant * * * who was trying to deny his own involvement in the crime. * * * The jurors deliberated at length before finding Drake guilty, and the court's felony-murder and aiding and abetting instructions make it impossible to know how they viewed Drake's involvement in the murder itself.

762 F.2d at 1461. Drake's sentence was vacated by the Eleventh Circuit.

Considering the prosecutor's penalty argument in light of the totality of the circumstances, we find that Newlon was unfairly prejudiced by the prosecutor's improper argument. As the district court concluded, the prosecutor's argument:

> infect[ed] the penalty proceeding with an unfairness that violates due process. The remarks were neither isolated nor ambiguous * * *. By contrast, *the jury was subjected to a relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing process.* This constitutional error requires that the sentence of death be vacated.

696 F.Supp. at 808 (emphasis added).

IV.

For the above reasons, we affirm the judgment of the district court.

APPENDIX

PROSECUTOR'S PENALTY PHASE ARGUMENT

Ladies and Gentlemen: this is going to be difficult for me, because I've never done this before. Before I actually comment to you what I think the punishment should be for Mr. Newlon-I would like to point out a few things in the Instructions:

The Judge in his Instructions is going to tell you that you have two choices and I'm sure you are all already aware of what those two choices are, and he's also going to tell you if you can't come to a unanimous decision, he

then will impose sentence, which will be a life sentence without parole for 50 years. Now, I want you to understand that Judge Ruddy is required by law to give you that Instruction. He's required by law to assess the punishment at life, if twelve people of St. Louis County can't decide. Now, that in no way is meant to indicate his Honor's personal feeling as to what the sentence should be. So, don't interpret that to mean that the Judge in this case feels Rayfield Newlon's punishment should be life, and not death. No one knows how he feels – you don't know, and it shouldn't matter to you, but just so you don't misunderstand the Instructions, Judge Ruddy is required by law if you people don't say death, then it's automatically life. I hope you understand that.

Now, you will be given some more instructions. This is an unusual procedure, but when I'm finished discussing this with you, you will be given some more instructions, and they'll talk about "aggravating circumstances" and "mitigating circumstances." By law, you must find at least one aggravating circumstance[,] and you are given lots of choices before you can assess the death penalty – but you must find one aggravating circumstance exists and you must be convinced beyond a reasonable doubt. You shouldn't have any trouble with that, because the two (2) aggravating circumstances listed are one, "whether the defendant murdered Mansfield Dave for the purpose of receiving money or any other thing of monetary value . . . " and, of course, he did, and under the law that is considered an aggravating circumstance, and two, "whether the murder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman." There's

no question about that. If it weren't for that second shot, you could see where reasonable people could differ and say the first shot may have been the result of panic, or maybe as a result of Mansfield Dave's alarm['s] going off, or maybe that he reached for his gun or maybe something happened and the person panicked, resulting in a horrible death – but, I won't take his life for it, but in this particular instance more than one shot was fired[,] and in order to fire that second shot[,] a new shell had to be put in and the other taken out, and a fresh one put in – so, [sic] the shotgun was broken; opened, and reloaded and re-aimed, and fired again. That is an execution – just plain and simply – an execution. So, I think you can find both aggravating circumstances[,] and you need only find one. By law this simply means that you twelve citizens must find it aggravating – and I certainly hope you find the circumstances of this particular crime aggravating – to say the least.

I think those are the only comments to make on the law other than the fact that there must also be some mitigating circumstances[,] and I think you ought to consider the contrast between aggravating circumstances, which I just discussed, [sic] and that you heard for one week – and mitigating circumstances that are listed: one, "whether the defendant was an accomplice in the murder of Mansfield Dave and whether his participation was relatively minor."

Now, not that it matters what role he played in this crime, but his role was definitely not minor . . . and,

"Whether the defendant acted [under] extreme duress or substantial domination of another person."

I don't think there should be any question in your minds who the orchestrator was, and I want you to ask yourselves if he was acting under [anyone's] control, or just doing what he wanted to do? That is, did he want to take money and was he willing to take a life to do it?

Three, "the age of the defendant at the time of the offense."

Well[,] I think he's twenty-four years old. Twenty-four going on about fifty. I submit to you that his chronological age is twenty-four[,] but he's a lot older than that. Anybody who could commit this kind of crime is older than twenty-four.

Now, when I said[,] initially, that this was a difficult thing for me – I've been a prosecutor for ten years and I've never asked a jury for a death penalty, but I can tell you in all candor, I've never seen a man who deserved it more than Rayfield Newlon. By returning your verdict in this case, – and you people found him guilty of capital murder – that either means that you believe beyond a reasonable doubt that he pulled the trigger, or that he had the frame of mind that's consistent with pulling the trigger, and I submit to you, that Rayfield Newlon did pull the trigger, and didn't pull it once, but pulled it twice – executed an innocent man in cold blood.

So, where do you go from there? I say to you that I never saw a man who deserved it more and I say that to you in complete sincerity, and it's my job, as I see it, to tell you that. This is the first time I've ever made this argument, and I'm kind of groping for words – which I'm sure appears obvious to you, but it's my job to get you people over that intellectual hump or obstacle, that killing is bad, because killing is not always bad. Killing in

self-defense is not bad; killing in war is not bad; taking Rayfield Newlon's life is not bad. It is not always bad to kill, but the fashion in which he did it, [sic] was wrong, and I hope to convince you that if you do it, it is right. Not only is one part of your difficult job over, and I'm sure your verdict was a difficult job[,] you people, and I don't want you to look back, because you did the right thing on the evidence and testimony; you did the right thing and don't look back. You found him guilty of capital murder, and now you only have to ask yourselves: [D]oes he deserve to live or die? I submit to you that he deserves to die. He doesn't deserve to breathe the same air that Mrs. Dave breathes. She's a widow with a son, and he's a son with no father. He doesn't deserve to breathe the same air. You saw Mrs. Dave on the witness stand[,] and she has to live with this the rest of her life – every night she goes to bed she has to wonder where her husband is – if you're Christian[,] and I don't know if you all are, but that woman has to literally wonder where he is.

Before you can take Rayfield Newlon's life, you have to give him a lawyer and a fair trial – he's entitled to that, and he got an excellent lawyer and a fair trial and twelve fair citizens. Now, if you say he deserved the death penalty, under the law, Judge Ruddy must review it[,] and if he agrees, then his decision is reviewed by the Supreme Court – which is only appropriate and fair under the circumstances. But, did Mansfield Dave have his day in Court? If Rayfield Newlon is killed[,] he'll know his appointed hour and have an opportunity to get his soul straightened out, [sic] and in a condition to meet

his Maker. I'm not saying this lightly, or for dramatic effects – not at all. How do we know if Mr. Dave was prepared to meet his Maker, or what condition his soul was in before he was blown away. Do you think he gives a damn? He didn't care – that's why I say Mrs. Dave wonders where her husband is – literally, where his soul is?

Now, if you think that's dramatic, then ignore those portions you think are, for those reasons, but I hope you won't think that. I'm telling you, that Rayfield Newlon deserves to die, not only for what he did, but I think it's absolutely critical to say to him and others like him, . . . that you have got to stop killing. You've got to stop robbing, and if you do this in St. Louis County[,] you're going to pay the price. You people have got the opportunity here to send out this message, and to send it out all over St. Louis County – your own community – and Kinloch is a part of your community – this could have happened in Ladue, Lemay, Florissant, or Ferguson – these kinds of crimes happen every day and go on happening, and you've got the opportunity to say that Rayfield Newlon's in this area, if you're going to do your killing and keep on doing it – don't do it in our community, because if you do, we're going to kill you because we['ve] got the right to do it; it's fair and appropriate and it's right – not cruel and not unusual punishment – it's right. Did Mr. Newlon show any remorse in the video tape? No. Did he show any remorse on the witness stand? No. Did he show any reaction or emotion when the verdict was returned last night? You look at him? No. He knew what was coming; he knew that what he did would send him to prison – that's no big deal – he's been there before, and what assurances do you have that he'll be there[in] fifty years? The [L]egislature could change the law. All it says is no parole. It doesn't say it can't be

commuted. There's no assurance of that at all. The law could be changed, but at least with death there is some assurance he won't commit any more crimes and the message is loud and clear, and perhaps others will think twice before they commit a robbery and take a life just for money. What I'm saying to you is if you come back with a life sentence[,] without him [sic] being eligible for parole for fifty years – that that won't get any reaction, and that's what he's expecting you to come back with – that's no big deal, going to prison, but maybe you'll get his attention if you come back with . . . "we sentence you to death." As sure as he sits there, he doesn't think you have the guts to do it. Do you know how many people are on death row in this State? None. We've got the death penalty, but how many are there? None. Mr. Newlon will be the first one, [sic] if you put him on death row. Let others like him note that we're serious about it, and we've had enough . . . if you're going to go in confectionaries and kill our proprietors in cold blood – unprovoked and unjustified; in cold blood – then, you're forfeiting your life.

You twelve people told me on voir dire when you were selected, [sic] you wouldn't rule out the death penalty – and I think three people excused themselves and said, "if I were to find somebody guilty of capital murder, I wouldn't even consider anything but the death penalty." Now, that surprised me. Three people said that[,] and perhaps they're right – the more I reflect on it, but the law gives you two alternatives. But, [sic] if somebody is guilty of capital murder[,] the ultimate crime, why should they get anything other than death? Why should they deserve to live, – even in some prison? Why should they be allowed to breathe the same air as the victim's family,

and that the rest of us breathe; why should they go on living? This crime didn't change his routine. After all of this was over, and the robbery was done, he went back and went to sleep; went to work the next day – whatever kind of job he has – tearing down houses, but he was no more afraid of killing than he is now of getting the death penalty. He doesn't think you'll do it, and I don't know if you'll do it either. I know you should. I'm asking you to do it.

I've got some notes here, I made early this morning. I sat by myself and thought for a long time about what I was going to say to you, and I don't want to miss some of the points I wrote down. I think they're important.

Rayfield was literally on a death mission. Rayfield sawed off the shotgun; he and Walter discussed they had to do this in the neighborhood, because they didn't have a car, and then Franz Williams had them a car, but they still didn't leave the neighborhood. Why? Because Rayfield Newlon was perfectly happy to take a human life – he didn't go to an area where they were not known, or wear a disguise or a mask or anything – no, and why not? Because Rayfield Newlon had no intention of leaving that store with Mansfield Dave alive. When he went in there, he went in with the intent of getting some money and to kill Mr. Dave. He was on a death mission and for all his effort, that's what he deserves: death. He killed in a totally unjustifiable fashion, and now it is your right to kill him, and I say to you to kill him, because it's not bad to kill him in this circumstance – not only, not bad, it's right.

Now, I'd like to talk about accomplishing a specific deterrent, and sending that message out. Now, there are questions on whether it deters or not, but let me say this to you: if it doesn't deter crime by taking Mr. Newlon's life, and it doesn't deter anyone else out in the community – what harm has been done? All you have done is take a life of a convicted murderer. That's all that you have done. The man deserves to die, and you've given him what he deserves, but, if it does deter, and the message rings out loud and clear, then it saves countless victims, and think[,] perhaps[,] how many people you'll save from this kind of slaughter if it does deter. At the very worst, if it doesn't you have simply given Rayfield what he deserves and that's an "eye for an eye and a tooth for a tooth" and that's what, I submit, this is all about, and I submit to you, that there is nothing wrong with that. You're not sitting in moral judgment of Rayfield – that's for God to do, when he and God meet, they can discuss that, – you're sitting in legal judgment now. If you give the death penalty, you'll have no trouble sleeping the rest of your lives. You'll know you did the right thing[,] and you'll know every morning when you read about rapes and murders in the newspaper that you, [sic] at least did the right thing when you were called upon, and when you were called upon to stand up and be counted – that you, were there.

You know – when I talk about sending out a message – well, I know the Charles Mansons wouldn't hear the message, or the Richard Specks or the "[S]ons of Sam" – those kinds of people wouldn't hear it because those people are insane – legally responsible [sic] for what they did, but they wouldn't get this kind of message, and in

the same – a truer fashion, he's not insane. This was simply a business venture – you know, he didn't hear any strange voices speaking to him, he just wanted some money, and all that stood between him and the money, [sic] was Mansfield Dave, and he eliminated – executed him. So Rayfield will hear the message[,] and it's absolutely imperative that you come back with a death penalty. I can't tell you how important it is – no, not for me – I'm an elected Prosecuting Attorney, so it doesn't matter to me with regard to my office – and I would hope that you would give me enough credit to know that I wouldn't stand before you trying this case, because the stakes are high, but I'm telling you it's important because it's time St. Louis County said: "we're not going to tolerate any more killing – if you do this in our county, and in our neighborhoods, and in our community, you will pay the price, and we're not going to let you off with a light imprisonment, where you'll spend the rest of your days watching T.V. and in the recreation room and visiting the store . . . " And, I'm not suggesting it's a pleasant life – it's a miserable one; horrible, and I wouldn't want to be in a prison – in fact, some people would probably rather be dead, but what I'm saying to you, [sic] is that the death penalty is what is right and fitting for Rayfield Newlon.

If Rayfield was [sic] going to harm your child, would you kill him? Would you have prevented this killing if you'd been in the Conveniency store with a gun, [sic] and you could have saved Mr. Dave's life? Would you have killed Rayfield? I think you would have [done] – at least, I hope you would have had the courage to do either one of those. If you think you would have, kill him now. Kill

him now. Once again, I hope you have the courage to do that, because it's tough.

I really don't have much more to say, but I hope to impress upon you that this is truly a war – I mean, a "street war," and it's justifiable to kill in a war. You know there are enemies – there's no question about it, Rayfield and others like him are the enemy[,] and it's still going to go on, and on, and on, unless you citizens of St. Louis County say it's not going to go on, and we may have to catch you and convict you, but when we do, we're going to execute you, and at least those people won't go and do it.

When I talked to you yesterday, [sic] as the trial lawyer in the case, I was trying to convince you – if I should use the word convince, but that he was guilty of capital murder, because that's what he's guilty of, and I convinced you of that. Perhaps there was [sic] evidence and remarks in closing arguments that persuaded you to that end, or maybe in spite of my efforts – but in any event, you came back with capital murder. Today I'm talking to you as Prosecuting Attorney of this County – the top law enforcement officer in St. Louis County. I represent the people of the State of Missouri in St. Louis County[,] and on behalf of Mrs. Dave and others like her, and her son, who no longer has a father, and for Mr. Dave – and all we've seen of him is in a pool of blood on a confectionary floor – for all of them, I'm asking you for the death penalty.

Rayfield NEWLON, Petitioner,

v.

Bill ARMONTROUT, Respondent.
No. 86-4229-CV-C-5.

United States District Court,
W.D. Missouri, C.D.

June 2, 1988.

ORDER

SCOTT O. WRIGHT, Chief Judge.

This petition for writ of habeas corpus was filed pursuant to 28 U.S.C. § 2254 by Rayfield Newlon, an inmate in custody at the Missouri State Penitentiary. The Petitioner seeks to vacate the sentence of death imposed on him after a jury trial in the Circuit Court of St. Louis County, Missouri in August, 1979.

Petitioner's conviction was affirmed on direct appeal by the Missouri Supreme Court in *State v. Newlon*, 627 S.W.2d 606 (Mo. 1982), *cert denied*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982). Petitioner then filed a motion to vacate the sentence pursuant to Missouri Supreme Court Rule 27.26. The motion was denied. The Missouri Court of Appeals affirmed the denial and denied a request for a rehearing or transfer to the Missouri Supreme Court. *Newlon v. State*, 705 S.W.2d 590 (Mo.Ct.App. 1986).

The petition for habeas relief contains four claims:

(1) The petitioner was denied due process of law due to the prosecutor's improper argument

in the penalty phase of the trial, which was not only inflammatory and prejudicial, but also diminished the jury's sense of responsibility in imposing the death penalty;

(2) The petitioner was denied his right to effective assistance of counsel during the penalty phase of the trial;

(3) The trial court unconstitutionally limited the factors the jury could consider in mitigation of the death penalty; and

(4) Missouri's "depravity of mind" instruction on aggravating circumstances is unconstitutionally vague.

The petitioner does not attack the guilty verdict or proceedings in the guilt phase of the trial, but challenges the imposition of the death penalty in this case on the basis of these four claims.

I. *Background*

Petitioner was charged with capital murder under Mo.Rev.Stat. Section 565.001, "in that defendant, acting with others, feloniously, unlawfully, willfully, knowingly and deliberately and with premeditation, killed Mansfield Dave," the proprietor of a small confectionary in Kinloch, Missouri. At the time, petitioner was a 23-year-old black male with an 11th grade education. He had previous convictions involving burglary, larceny and stealing. He had served time in the penitentiary.

The evidence connecting defendant with the crime consisted of the testimony of a participant, Walter West, and statements by petitioner to police while in custody. Petitioner's statements were conflicting. In an initial

statement to the police, he admitted helping West and Franz Williams, a third participant, saw off a shotgun and go to the store intending to rob it. However, he contended that he had stayed in the car while West and Williams went inside the store. Williams, whose fingerprints were identified on a soda bottle left on the check-out counter of the confectionary where Dave was shot, was not called as a witness although he had been arrested, confined, and charged with capital murder.

Petitioner later made a videotaped statement where he admitted that he had entered the store with Williams but that Williams had done the shooting while petitioner was in the rear of the store. In this statement he also asserted that, before entering the store, Williams had expressed the possibility that he "might have to shoot" Mr. Dave because he knew him.

In his testimony at trial, petitioner denied being present at the scene and denied killing Mr. Dave. Walter West testified that Williams came from the back of the store just as petitioner was at the counter "messing with the shotgun." When Mr. Dave turned around, there were two consecutive "puffs of smoke," and then Williams and petitioner fled from the store. West stated that he observed this from his vantage point sitting in his automobile on the opposite side of the street from the store. West quoted petitioner as reporting to him later that "I had to burn him."

The robbery plan failed, as no money was taken from the store. However, Mr. Dave suffered two gunshot wounds and died. Mrs. Dave testified that she ran toward the store when she heard an alarm and saw Williams,

noting that he was not carrying anything. This statement apparently corroborated West's testimony that petitioner, not Williams, did the shooting. The shotgun was delivered to the police by West's cousin.[1] The jury found petitioner guilty of capital murder. No additional evidence was presented at the punishment phase of the trial.

II. *Standard of Review*

The standard of review for habeas corpus petitions by prisoners in state custody is set out in 28 U.S.C. § 2254(d). A written determination after a hearing on the merits of a factual issue, made by a state trial or appellate court of competent jurisdiction, is presumed to be correct unless one of the conditions set forth in § 2254(d)(1)-(7) is found to exist. If none of these conditions is found, or unless the state court determination is "not fairly supported by the record," 28 U.S.C. § 2254(d)(8), the petitioner must establish by convincing evidence that the factual determination by the state court was erroneous. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

This presumption of correctness does *not* apply to legal findings or to mixed questions of law and fact. *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 1306, 71 L.Ed.2d 480 (1982). Factual issues involve "what are termed basic, primary, or historical facts: facts 'in the

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[1] Although West had also originally been charged with First Degree Murder in the death of Mr. Dave, he made an agreement to testify for the state and pled guilty to Second Degree Murder for a ten-year sentence in a penitentiary out-of-state.

sense of a recital of external events and the credibility of their narrators. . . . ' " *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Mixed questions of law and fact, however, involve "the application of legal principles to the historical facts of [the] case." *Cuyler v. Sullivan*, 446 U.S. 335, at 342, 100 S.Ct. 1708, at 1714, 64 L.Ed.2d 333 (1980). As Justice Frankfurter once stated: "Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." *Brown v. Allen*, 344 U.S. 443, 507, 73 S.Ct. 397, 446, 97 L.Ed. 469 (1953). *Cf., Sumner*, 102 S.Ct. at 1306.

III. *Exhaustion*

Under 28 U.S.C. § 2254(b), exhaustion of state remedies is a prerequisite to the filing of a petition for a writ of habeas corpus. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The purpose of this requirement is to further the principles of comity by permitting state courts to have "the first opportunity to hear the claim(s) sought to be vindicated." *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 620, 88 L.Ed.2d 598 (1986); *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971).

"To exhaust his state remedies, a habeas petitioner only needs to have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim[s]".

Little v. Armontrout, 819 F.2d 1425, 1428 '8th Cir.1987). Where each of the claims in the petition were [sic] either "expressly raised by [the petitioner] in state court proceedings or discussed by the state courts," then the state courts have been provided with a "fair opportunity" to rule upon all claims presented in the habeas petition. *Id.*

Here, the petitioner raised and the state courts have discussed each of the petitioner's four claims. Petitioner's "Second Amended Petition Under Supreme Court Rule 27.26," at 4-5, filed Feb. 10, 1984, clearly presents his constitutional claim that he was denied due process and Eighth Amendment protections due to the prosecuting attorney's improper argument in the penalty phase of the trial. *See also* supporting "memorandum of law" to Second Amendment 27.26 Petition, at 22-32. In affirming the denial of this motion, the Missouri Court of Appeals for the Eastern District expressly stated: "The prosecutor's argument did not deprive movant of a *fundamentally fair* trial." *Newlon v. State*, 705 S.W.2d at 592. (emphasis supplied).

The state courts also expressly considered plaintiff's constitutional claim of ineffective assistance of counsel at the penalty phase of the trial. In *Newlon*, 705 S.W.2d at 595, the Court of Appeals expressly cited the relevant federal constitutional case, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in addition to *Seales v. State*, 580 S.W.2d 733, 736 (Mo. 1979), which held that the courts of Missouri apply the same standards as the federal courts in the Eighth Circuit for determining the effectiveness of counsel.

The State Appellate Court discussed petitioner's claim that the trial court's instruction No. 21 limited the jury's consideration of mitigating factors when deliberating on the death penalty. *Newlon*, 705 S.W.2d at 593. Although the Court noted initially that it does not ordinarily review instructional error under Rule 27.26, it in fact did address the merits, and quoted the United States Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the leading case on this issue.

Finally, petitioner's fourth claim was expressly considered and rejected by the Missouri Supreme Court on direct appeal. *State v. Newlon*, 627 S.W.2d at 621. Here, petitioner alleges that the phrase "depravity of mind" in the aggravating circumstances listed in Mo.Rev.Stat. § 565.012.2(7) is unconstitutionally vague and violative of the due process clause of the Fourteenth Amendment. The Missouri Supreme Court examined the claim and based its discussion on *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). The Missouri Court of Appeals refuses to reconsider contentions rejected in the original appeal in a 27.26 proceeding. *Newlon*, 705 S.W.2d at 591. The exhaustion requirement has been satisfied.

IV. *Procedural Default*

Respondent additionally asserts that this Court lacks jurisdiction to decide the issues in petitioner's first claim that the prosecutor's comments were unconstitutional because no contemporaneous objection was made at the trial. Petitioner concedes that Missouri has a "contemporaneous objection rule."

In *Wainwright v. Sykes*, 433 U.S. 72, 84, 97 S.Ct. 2497, 2505, 53 L.Ed.2d 594 (1977), the court held that, absent "a showing of cause for noncompliance and . . . actual prejudice resulting from the alleged constitutional violation," a federal court is barred from addressing issues on habeas corpus if the state courts refused to hear the claim on the basis of an independent and adequate state procedural ground. However, "[t]he mere existence of a basis for a state procedural bar does not deprive [the federal court] of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985), *citing Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

In *Ulster County*, the court noted that the purpose behind the *Wainwright* rule is based on considerations of comity and "to accord appropriate respect to the sovereignty of the states in our federal system." *Ulster County*, 442 U.S. at 154, 99 S.Ct. at 2223. However, no such disrespect is implied where the state court's denial of post-conviction relief was not based upon the contemporaneous objection rule but, rather, was a decision on the merits. Therefore, the federal court can also reach the merits of petitioner's claim for habeas relief. *Euell v. Wyrick*, 675 F.2d 1007, 1009 (8th Cir. 1982).

It is apparent on careful examination, as noted above, that the Missouri Court of Appeals did not ignore petitioner's claim that the prosecutor's arguments were unconstitutional. Instead, it summarily rejected the claim

on its merits by concluding that "[t]he prosecutor's arguments did not deprive movant of a fundamentally fair trial." *Newlon*, 705 S.W.2d at 592.

Even though the Missouri Supreme Court purported to examine the remarks under the plain error rule on direct appeal, the principal opinion discusses at length the propriety of the prosecutor's argument. *Newlon*, 627 S.W.2d at 616-20. The dissent discusses the constitutional issues raised, even if the word "constitutional" is not used, concluding that the death sentence "was imposed under the influence of passion, prejudice, and other arbitrary factors due to the prosecutor's argument." *Newlon*, 627 S.W.2d at 633-34. (Seiler, J., dissenting, joined by Bargett, J.) The state's interests have been preserved where the state courts addressed the merits of the impropriety of the closing argument. Hence, under *Ulster County* and *Euell*, it is unnecessary to examine whether petitioner can demonstrate "cause and prejudice" for failing to object at trial.

V. *Prosecutor's Improper Argument*

Petitioner presents two claims relating to the prosecutor's arguments in the penalty phase of the trial. First, he asserts that the jurors were subjected to an argument based on fear, premised on facts not in evidence, and calculated to inflame the jury and remove reason from the sentencing process. When considered in light of the "totality of circumstances," it is urged that the effect of this misconduct mandates reversal of the death penalty or a new trial only on the issue of punishment. Second, petitioner argues that the prosecutor and trial court

diminished the jury's sense of responsibility in imposing the death penalty, in violation of the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

To prevail on his first claim of prosecutorial misconduct, petitioner must show that the prosecutor's actions were so egregious as to render the trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The errors must be of constitutional magnitude, a determination which is made by considering the totality of circumstances, and whether the entire sentencing proceeding was fundamentally unfair. *Id.* Of course, "the process of constitutional line drawing in this regard is necessarily imprecise." *Id.*, 94 S.Ct. at 1872.

Petitioner first complains of the prosecutor's expressions of his personal belief in the propriety of the death sentence in this case and by appearing to have special knowledge outside the record:

> Now, when I said initially, that this was a difficult thing for me – I've been a prosecutor for ten years and I've never asked a jury for a death penalty, but I can tell you in all candor, I've never seen a man who deserved it more than Rayfield Newlon. By returning your verdict in this case, [sic] – and you people found him guilty of capital murder – that either means that you believe beyond a reasonable doubt that he pulled the trigger, or that he had the frame of mind that's consistent with pulling the trigger, and I submit to you, [sic] that Rayfield Newlon did pull the trigger, and didn't pull it once, but pulled it twice – executed an innocent man in cold blood.

> So, where do we go from there? I say to you that I never saw a man who deserved it more and I say that to you in complete sincerity, and it's my job, as I see it, to tell you that. (Tr. 599-600).

"An attorney's personal opinions are irrelevant to the sentencing jury's task." *Brooks v. Kemp*, 762 F.2d 1383, 1408 (11th Cir.1985). Here, the discussion of the prosecutor's practice of declining to seek the death penalty *until* this particular case arose was improper. The claim was unsupported by the evidence and irrelevant. It also implied to the jury that the state believed that this case, above others, warranted the death penalty. *Id.* at 1410. The argument is particularly offensive because during most of this 10-year period, the death penalty statutes in Missouri were considered unconstitutional and no defendant, no matter how heinous, atrocious or cruel his crime, faced the possibility of a capital sentence. *See State v. Duren*, 547 S.W.2d 476 (Mo. 1977) (en banc). "Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required. This kind of abuse unfairly plays upon the jury's susceptibility to credit the prosecutor's viewpoint." *Brooks*, 762 F.2d at 1410.

The prosecutor carried this theme throughout his argument:

> "This is the first time I've ever made this argument, and I'm kind of groping for words – which I'm sure appears obvious to you, because it's my job to get you people over that intellectual hump or obstacle, that killing is bad. Killing

> in self-defense is not bad; killing in war is not bad; taking Rayfield Newlon's life is not bad. . . . (Tr. at 600).
>
> I submit to you that he deserves to die. He doesn't deserve to breathe the same air that Mrs. Dave breaths. She's a widow with a son, and he is a son with no father. He doesn't deserve to breathe the same air. (Tr. at 601). I'm telling you that Rayfield Newlon deserves to die, not only for what he did, but I think it is absolutely critical to say to him and others like him . . . that you have to stop killing. (Tr. at 602).

The prosecutor ended his argument by emphasizing his position of authority and adding a final vivid description of the victim:

> "Today I'm taking to you as Prosecuting Attorney of this County – the top law enforcement officer in St. Louis County. I represent the people of the State of Missouri in St. Louis County and on behalf of Mrs. Dave and others like her, and her son, who no longer has a father, and for Mr. Dave – and all we've seen of him is in a pool of blood on a confectionary floor – for all of them, I'm asking you for the death penalty. (Tr. at 608).[2]

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[2] Respondent's brief filed April 26, 1988[,] alleges that "[w]ith a sharp pencil, petitioner is able to excise sentences that he does not like to declare them to be error" . . . and "perform a verbal autopsy upon a paragraph of a transcript and find unpleasant words." Respondent's "Response to Court Order," at 15-16. Thus, respondent purports to republish the entire closing argument in order for the Court to examine it for constitutional error. Ironically, however, the respondent's submitted "entire context" omits certain significant phrases and sentences, including a portion of this final paragraph cited

(Continued on following page)

"[T]he prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." *Brooks*, 762 F.2d at 1399. Thus, the prosecutor's misconduct may be grounds for reversal partly because of a "systemic belief that a prosecutor, while an advocate, is also a public servant 'whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " *Id., quoting Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). The *Berger* court summarized the danger of excessive jury influence as follows:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, *improper suggestions, insinuations, and especially, assertions of personal knowledge*, are apt to carry much weight against the accused when they should properly carry none. (*Berger*, 295 U.S. at 88, 55 S.Ct. at 633. (Emphasis supplied).

These same principles apply with equal force to a prosecutor's statements in a penalty trial. It is wrong for the prosecutor to undermine the jury's discretion in determining punishment "by implying that he, or another high authority, has already made the careful decision required. This kind of abuse unfairly plays upon the jury's susceptibility to credit the prosecutor's viewpoint," *Brooks*, 762 F.2d at 1410.

(Continued from previous page)

above. The Court has examined the entire official transcript of the proceedings in consideration of the petition for habeas corpus relief under § 2254.

Petitioner next complains that the prosecutor made other statements throughout the argument that were intended to personalize and inflame the fears, passions and prejudices of the jury. First, the prosecutor attempted to link petitioner with Richard Speck, Charles Manson, and the Son of Sam:

> You know – when I talk about sending out a message – well, I know the Charles Mansons wouldn't hear the message, or the Richard Specks or the "Sons of Sam" – those kinds of people wouldn't hear it because those people are insane – legally responsible [sic] for what they did, but they wouldn't get this kind of message, and in the same – a truer fashion, he's not insane. This was simply a business venture – you know, he didn't hear any strange voices speaking to him, he just wanted some money, and all that stood between him and the money, was Mansfield Dave, and he eliminated – executed him. (Tr. at 606).
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> * * *
>
> If Rayfield was [sic] going to harm your child, would you kill him? Would you have prevented this killing if you'd been in the conveniency store with a gun, [sic] and you could have saved Mr. Dave's life? Would you have killed Rayfield? I think you would have [done] – at least, I hope you would have had the courage to do either one of those. If you think you would have, kill him now. Kill him now. Once again, I hope you have the courage to do that, because it's tough.
>
> I really don't have much more to say, but I hope to impress upon you that this is truly a war – I mean, a "street war" and it's justifiable to kill in a war. You know there are enemies – there's no question about it. Rayfield and others like him are the enemy[,] and it's still going to

> go on, and on, and on, unless you citizens of St. Louis County say it's not going to go on, and we may have to catch you and convict you, but when we do, we're going to execute you, and at least those people won't go and do it. (Tr. at 606-07).

The prosecutor apparently intended the jury to find petitioner more egregious than infamous killers and invites the jurors to give petitioner death as punishment for the crimes of Manson, Speck and Son of Sam and to kill him before he could harm their own children. The comments equate the jury's task with self-defense and war situations that are not analogous. Moreover, these broad comparisons undermine the requirement that the sentencing be *individualized to this particular situation*.

Leading into the diatribe set forth above, the prosecutor referred to three persons on the venire panel who had to excuse themselves because they said they would *not* consider *anything but* the death penalty if they returned a guilty verdict. Then he argued to the sentencing jury as follows:

> [T]he law gives you two alternatives. But if somebody is guilty of capital murder, the ultimate crime, why should they get anything other than death? Why should they deserve to live – even in some prison? Why should they be allowed to breath the same air as the victim's family, and that the rest of us breathe; why should they go on living?

The death penalty differs from any other type of punishment not only in its severity and finality, but also in its impact on society. When the sovereign takes the life of one of its citizens, it is vital that "any decision to impose the death sentence be, and appear to be, based on

reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). As Judge Charles Blackmar of the Missouri Supreme Court recently noted in *State v. Leisure*, 749 S.W.2d 366, 385 (Mo.1988) (Blackmar, J., concurring in part), in regard to closing argument, "[since *State v. Newlon*, 627 S.W.2d at 607,] the word is out that 'anything goes' in the penalty phase. Missouri justice should adhere to a higher standard. The penalty phase should not become a legalized lynching." Indeed, the United States Constitution demands more – federal justice requires "fundamental fairness."

The Court will evaluate whether the entire sentencing hearing was fundamentally unfair later in this section. However, because the totality of circumstances must be considered, petitioner's final challenge to the prosecutor's argument must first be examined, that is, whether the prosecutor, by his remarks, and the Court, by its failure to give a curative instruction, diminished the jury's sense of responsibility in imposing the death penalty. During the argument, the prosecutor told the jury that if they returned a sentence of death, it would be reviewed:

> Now, if you say he deserves the death penalty, under the law, Judge Ruddy must review it[,] and if he agrees, then his decision is reviewed by the Supreme Court. (Tr. at 601).

This statement was incorrect because the trial judge does not have the authority to review the sentence.[3] The

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[3] *See* Mo.Rev.Stat. § 565.006 repealed by L.1983, S.B. No. 276, p. 922 § 1.

prosecutor also stressed that any sentence short of death could result in only temporary confinement:

> Did he show any reaction or emotion when the verdict was returned last night? You look at him? No. He knew what was coming; he knew that what he did would send him to prison – that's no big deal – he's been there before, and what assurances do you have that he'll be there[in] fifty years? The [L]egislature could change the law. All it says is no parole. It doesn't say it can't be commuted. There's no assurance of that at all. The law could be changed, but at least with death there is some assurance he won't commit any more crimes (Tr. at 602-03). .

In *Caldwell v. Mississippi*, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985), the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Bias against the defendant enters here, as well as unreliability. This is in part because appellate courts are limited in their review and, thus, generally review sentencing determinations with a presumption of correctness. *Caldwell*, 105 S.Ct. at 2641. But, of course, this was not mentioned to the jury.

The *Caldwell* court also noted another "intolerable danger of bias" in this situation: that is, "[e]ven when a sentencing jury is *unconvinced* that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err

because the error may be corrected on appeal.' " *Id.* (emphasis supplied).

The Prosecuting Attorney requested such a message:

> "You people have got the opportunity here to *send out this message, and to send it out all over St. Louis County – your own community* – and Kinloch is a part of your community. This could have happened in Ladue, Lemay, Florissant or Ferguson – these kinds of crimes happen every day and go on happening, and you've got the opportunity to say that Rayfield Newlon's in this area, if you're going to do your killing and keep on doing it – don't do it in our community, because if you do, we're going to kill you because we['ve] got the right to do it; its fair and appropriate and it's right – not cruel and unusual punishment – it's right." (Tr. at 602) (emphasis supplied).

Similarly, the Supreme Court has recognized that "[i]f the jury understands that only a death sentence will be reviewed, it will also understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence." *Caldwell*, 105 S.Ct. at 2641. This creates the possibility of an execution in absence of a real determination of the propriety of the death sentence. *Id.* Moreover, if the jury is divided on the proper sentence, "the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id.* at 2642.

The respondent's reliance on *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), for the proposition that states are free to expose capital sentencing juries to any argument concerning post-sentencing

procedures must fail. *See Caldwell*, 105 S.Ct. at 2643. As in *Caldwell*, the argument here was neither accurate (as to the trial judge's review) nor linked to any valid sentencing considerations.

In examining the totality of circumstances in the penalty proceeding, this Court is cognizant that defense counsel made no objections and failed to rebut the improper and misleading statements. Moreover, the trial judge made no comments *sua sponte* and issued no curative instructions. The prosecutor's rhetoric continued uninterrupted, and by silence, apparently sanctioned by the trial judge. Although *Donnelly* "warns against holding every improper and unfair argument of a state prosecutor to be a federal due process violation, it does not insulate all prosecutorial comments from federal constitutional objections." *Caldwell*, 105 S.Ct. at 2644.

Here, the prosecutor's misleading comments concerning his personal belief that this case deserved the death penalty more than any other in ten years, the prosecutor's emphasis on his authority as the "top law enforcement officer of the County," the comparison to infamous mass-murderers, the personalized analogy to the jurors' self-defense of their own children, the references to war and courage, the insinuation that all murders should be punished with death, and the reassurance that appellate review would follow if a death sentence were rendered, all combined to infect the penalty proceeding with an unfairness that violates due process. The remarks were neither isolated nor ambiguous, [sic] as in *Donnelly*, 416 U.S. 637, 94 S.Ct. 1868. By contrast, the jury was subjected to a relentless, focused, uncorrected argument based on fear, premised on facts not in evidence,

and calculated to remove reason and responsibility from the sentencing process. This constitutional error requires that the sentence of death be vacated.[4]

VI. *Ineffective Assistance of Counsel at the Penalty Hearing*

Petitioner claims that his trial lawyer, Phillip Ayers, was constitutionally ineffective during the penalty phase of the trial because he failed to investigate and prepare for the penalty phase, failed to present mitigating evidence, and failed to object to the prosecutor's improper closing argument in the penalty phase.

An ineffective assistance of counsel claim presents a mixed question of law and fact. *Kellogg v. Scurr*, 741 F.2d 1099, 1101 (8th Cir. 1984). Therefore, as noted earlier, the presumption of correctness accorded the factual determinations of the state court under 28 U.S.C. § 2254(d) applies only to the historical facts underlying the attorney's performance, but a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court. *Id. Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984). Moreover, certain factual findings by the state

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[4] At the evidentiary hearing before this Court on February 18, 1988, the petitioner offered evidence that the Prosecuting Attorney had made statements at a tavern, in the presence of his assistants, that he was going to "let it all hang out" at the death penalty hearing. The Court rejected this evidence on the grounds that it was hearsay and that the argument spoke for itself. In reviewing the argument, whether the prosecutor made the rejected statement or not, it is clear that he did, in fact, "let it all hang out."

court here are "not fairly supported in the record," and thus are not presumptively correct. *See* § 2254(d). These facts will be discussed later in this section.

In *Strickland*, the Supreme Court set forth a two-pronged test to ascertain whether errors committed by a defendant's counsel amounted to ineffective assistance of counsel. First, petitioner must show that counsel's representation was deficient, that is, that it fell below an objective standard of reasonableness, with every effort to "eliminate the distorting effects of hindsight." *Strickland*, 104 S.Ct. at 2064-65. Second, prejudice must be shown by establishing the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 2068. "Counsel [ ] has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 2065.

These Sixth Amendment principles apply to a capital sentencing procedure in the same manner that they apply to the guilt phase in a criminal prosecution. *Id.* at 2064, *citing Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983) and *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

Applying *Strickland*, the Court finds that trial counsel's representation of the petitioner during the penalty phase fell below an objective standard of reasonableness, so that the adversarial process was seriously undermined. Ayers introduced no evidence during the penalty phase regarding petitioner's character or background.

The Supreme Court has ruled that a sentencing jury must consider[,] "as a mitigating factor, any aspect of a defendant's character of record." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *cf., Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The record of the hearing for the 27.26 motion reveals that Ayers did no investigation in this regard. Surprised and disappointed at the guilty verdict, counsel stated that he didn't *consider* introducing any evidence of the petitioner's low I.Q., school records, upbringing, reputation as a follower or nonviolent nature. This was not a reasoned decision after a thorough investigation. Ayers testified that his decision was not strategic. Hearing Tr. at 311, 315. Counsel also stated that he was not aware of the Supreme Court's *Lockett* decision, Hearing Tr. at 311, and testified before this Court that he did not talk to other attorneys for advice on presenting a defense of the death penalty at the sentencing phase.

The factual historical findings of the state court are not inconsistent here. It is irrelevant that counsel did not receive cooperation from certain family members in preparing for the guilt phase of the trial. The fact that certain potential witnesses knew nothing of the events surrounding the crime has nothing to do with their ability to provide evidence of petitioner's background and character to the sentencing jury as mitigating factors. The state court's finding that petitioner did not provide the names of possible contacts is not conclusive because counsel never asked petitioner for this information, explained its

importance or discussed a sentencing defense strategy with petitioner.

It is also irrelevant that petitioner may have given conflicting versions of the events surrounding the crime. Although this may have influenced the jury's decision in the guilt phase, this does not relieve counsel of the duty to investigate and prepare for the penalty trial. Witnesses at the 27.26 hearing before the state court and this Court stated that they would have testified as to petitioner's character and upbringing if they had been contacted. There is no evidence to the contrary.

Ayers did not even consider presenting any additional evidence at the penalty phase. This does not comport with the notion that the sentencing phase should be a "distinct procedure where the jury's attention is focused not just on the circumstances of the crime, but also on special facts about this defendant that mitigate against imposing capital punishment!" *Blake v. Kemp*, 758 F.2d 523, 534 (11th Cir. 1985). "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 305 (1986). Here, there was neither. Thus, these facts distinguish this case from *Burger v. Kemp*, ___ U.S. ___, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987).

In *Burger*, trial counsel presented no mitigating evidence at the sentencing trial, but had investigated his client's background and made a *strategic decision* that his client's interest would not be served by presenting such evidence.

Unlike the *Burger* case, however, Attorney Ayers admitted that he never discussed with petitioner the possibility of calling witnesses in the penalty phase, nor did he ever seek petitioner's help in procuring witnesses to demonstrate his character or background. The total lack of preparation for the penalty trial here put[s] at risk "the reliability of the adversarial testing process." *Id.*

Trial counsel also erred when he did not object to the prosecutor's inflammatory remarks in the penalty phase and failed to make any effort to rebut the same in his own closing argument. The state hearing court's finding that the failure to object was a deliberate strategic choice is contradicted by the record and not entitled to a presumption of correctness. Both at the state hearing and before this Court, counsel was unable to explain or excuse his failure to object. When asked about specific sections of the prosecutor's argument, he acknowledged that the remarks were improper and objectionable but stated several times that he didn't know why he failed to object. Although he opined that at some unknown point he felt the prosecutor's remarks "were so prejudicial" that "there could be a chance on appeal," he clearly affirmed that this was *not* a strategic reason. At the hearing before this Court, Ayers again offered only this explanation: "I simply was caught flat[-]footed."

"The failure to object may in some circumstances be so derelict that the claim of ineffective assistance of counsel must be sustained." *Riley v. Wyrick*, 712 F.2d 382, 385 (8th Cir. 1983). The attorney acknowledged even at the beginning of his own argument that he was totally unprepared to defend his client against the death penalty:

> "I know I'm not as effective as Mr. Westfall – I don't know what to say. I thought about it all night. I just don't know what to say. The only person that can stand up for Rayfield, though, is me. Please don't kill him. He didn't do it."

Ironically, Ayers was not able to stand up for petitioner with mitigating evidence, or to rebut the prosecutor's devastating argument. The failure to object or counter the attack again was a failure to ensure a reliable adversary proceeding. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.E.2d 657 (1984). Combined with the failure to produce any information of petitioner's background or character as a mitigating circumstance, trial counsel's representation falls outside the bounds of reasonable professional behavior and satisfies petitioner's burden under the first prong of the *Strickland* test.

The second prong of *Strickland* is also satisfied. The prejudicial effects of the prosecutor's argument were discussed in the previous section. Counsel's failure to object prevented any ruling which could have stopped the continual tirade or softened the effect with a curative instruction. The attorney did not attempt to correct the prejudicial effects or other errors of law by rebuttal.

Moreover, in a capital case where the defendant is youthful and mentally slow, evidence of these facts are extraordinarily germane to the individualized inquiry that the sentencing jury is constitutionally required to perform. Evidence of a turbulent family history is particularly relevant and must be considered by the jury. *Eddings*, 455 U.S. at 115, 102 S.Ct. at 877. The petitioner certainly would have been unconstitutionally prejudiced

if the court had not permitted him to put on all mitigating evidence at the penalty phase. *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964. Here, Ayers' "failure to seek out and prepare any witnesses to testify as to mitigating circumstances just as effectively deprived him of such an opportunity." *Blake*, 758 F.2d at 535. As in *Blake*, counsel's actions in this regard "were not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure – albeit prompted by a good faith expectation of a favorable verdict – to prepare for perhaps the most critical stage of the proceedings." *Id.*

These professional errors, taken together, raise a reasonable doubt that, but for the errors, the outcome of the sentencing procedure would have been different, and petitioner would not have been sentenced to death. Hence, the petitioner's death sentence violates the Sixth Amendment.

VII. *Limitation of Mitigating Factors*

Petitioner argues that Instruction No. 21 precluded the jury from considering as mitigating factors any evidence except that pertaining to the murder and three other specific factors. Instruction No. 21 reads as follows:

Instruction No. 21

> If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 20, it will then become your duty to

> determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Mansfield Dave.
>
> You may also consider:
>
> 1. Whether the defendant was an accomplice in the murder of Mansfield Dave and whether his participation was relatively minor.
>
> 2. Whether the defendant acted under extreme duress or substantial domination of another person.
>
> 3. The age of the defendant at the time of the offense.
>
> If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

Petitioner contends that jury instructions which effectively prevent consideration of any mitigating circumstances are impermissible under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Lockett*, the Court concluded that:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604, 98 S.Ct. at 2964 (emphasis in original).

Petitioner has also pointed out that, subsequent to his trial, the Missouri Supreme Court apparently recognized the deficiency in this instruction by adding a third paragraph:

> "You may also consider any circumstance which you find from the evidence in extenuation or mitigation of punishment." (MAI CR2d 15.44) (for Homicides committed after May 25, 1977).

The third paragraph of the instruction form has since been changed again to provide:

> "You may also consider any circumstance which you find from the evidence in mitigation of punishment." (MAI CR2d 13.44) (for Homicides committed after Sept. 30, 1984).

In *Eddings v. Oklahoma*, 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982), the Supreme Court further clarified that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." These cases were recently reaffirmed by a unanimous court in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

This Court first addresses respondent's contention that the jury was instructed to consider all the evidence in determining mitigating facts. A close examination of the record reveals that this is *not* true. The instruction listed three specific factors in addition to "all of the evidence *relating to the murder of Mansfield Dave*." (emphasis supplied). This obviously does not include

consideration of other factors outside the events surrounding the crime, such as petitioner's family background.

As noted in the previous section on ineffective legal assistance at the penalty phase, counsel's representation was constitutionally deficient, partly because he failed to introduce *any evidence* of defendant's background and character. Thus, it is unnecessary for the Court to consider petitioner's "*Lockett* claim." However, the discussion of *Lockett* and it progeny buttresses the conclusion that there was ineffective assistance of counsel at the penalty trial. Had any evidence been presented, for example, as to petitioner's upbringing, [sic] (one of 13 children raised in a one-room shanty with an abusive alcoholic father) or his learning disability, then the Constitution would require the sentencers to consider these factors as mitigating circumstances. *Hitchcock,* 107 S.Ct. 1821. In light of this clear rule, it is inconceivable that counsel's failure to present such evidence could be considered anything but prejudicial to the outcome.

VIII. *Vagueness of Trial Court's Instruction on Aggravating Circumstances*

Petitioner finally contends that the instruction on aggravating circumstances presented to the sentencing jury was impermissibly vague. This Court agrees. Instruction No. 19 provided:

Instruction No. 19

In determining the punishment to be assessed against the Defendant for the murder

of Mansfield Dave, you must first unanimously determine:

1. Whether the Defendant murdered Mansfield Dave for the purpose of receiving money or any other thing of monetary value.

2. Whether the murder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman.

You are further instructed that the burden rests upon the State to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the Defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

The instruction was based on Mo.Rev.Stat. § 565.012.2(7)[,] which sets forth a statutory aggravating circumstance if the "offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."[5]

This Court notes that Instruction No. 19 did not instruct on "torture" as an alternative to "depravity of mind." The verdict fixing punishment at death indicated

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[5] Repealed by L.1983, S.B. No. 276, p. 923, § 1, and replaced by Mo.Rev.Stat. § 565.032.2(7) (1988).

that the jury found only "Aggravating Circumstance No. 2" in "Instruction No. 19." Thus, because the death sentence cannot stand if this single aggravating circumstance is invalid, the analysis focuses only on the phrase "depravity of mind" as applied in this case. Although the Supreme Court has not held such language to be facially unconstitutional, it has "not stopped at the face of a statute but [has] probed the application of statutes to particular cases." *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987). A state-court interpretation of the statutory language of an aggravating circumstance can be "so broad that it may have vitiated the role of the aggravating circumstance in guiding the sentencing jury's discretion." *Id.*

The Missouri Supreme Court has not provided a limiting instruction for the term "depravity of mind" even though it held that such a finding was factually substantiated in this case. *State v. Newlon*, 627 S.W.2d at 622, comparing the facts to *Turner v. Virginia*, 221 Va. 513, 273 S.E.2d 36 (1980), which had been affirmed by the Virginia Supreme Court, and citing a list of other Missouri cases without a factual comparison. *Id.* at 623. Petitioner argues that the vagueness of the instruction is demonstrated by the jury's request during deliberations for the Court to "please give a definition of 'depravity of mind'." The trial judge advised the jury that he "could not give them any further instructions."

In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Supreme Court held unconstitutional a death sentence based on the finding that the offense was "outrageously or wantonly vile, horrible or

inhuman." Justice Steward, writing for a plurality, observed:

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

Id. at 428, 100 S.Ct. at 1764 (footnotes and citations omitted).

Because the channeling function of an aggravating circumstance requires objective determination of such a factor, it must be described in "terms that are commonly understood, interpreted and applied." *Cartwright v. Maynard*, 822 F.2d 1477, 1485 (10th Cir.1987). Otherwise, a standard may be so vague that it would "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in [*Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] could occur." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). The *Cartwright* court recognized that if "an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibility to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die." *Cartwright*, 822 F.2d at 1485, *quoting* Rosen, *The "Especially Heinous" Aggravating Circumstance*

in Capital Cases – The Standardless Standard, 64 N.C.L.Rev. 941, 954 (1986).

Death penalty statutes must be structured so that the penalty is not "administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 839, 93 L.Ed.2d 934 (1987). In *Cartwright*, the Tenth Circuit determined that a death sentence was invalid where the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowly construction of "especially heinous, atrocious or cruel" in that case. The state appellate court's description of the events surrounding the murder and conclusion that those events "adequately supported the jury's finding" did not provide a proper narrowing construction. The same situation is present here. Absent a clear, limiting directive, the words "depravity of mind" in this case are not capable of objective determination. As in *Godfrey*, "Nothing in [these] words, standing alone, [ ] implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1765. Thus, the sentence of death in this case is unconstitutional for this reason, as well as for the reasons discussed above.

Accordingly, it is hereby

ORDERED that a writ of habeas corpus issue in this case vacating petitioner's sentence of death. Petitioner shall either receive a new trial on the penalty phase or be resentenced to life imprisonment without parole for fifty years.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

PERSONS IN STATE CUSTODY APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

Name Rayfield Newlon

Prison Number CP-1

Place of Confinement Missouri State Penitentiary, Jefferson City, Missouri

United States District Court Western District of Missouri

Case No. _____ (to be supplied by Clerk of U.S. District Court)

Rayfield Newlon PETITIONER
(Your Full Name)

v.

Bill Armontrout RESPONDENT
(Name of Warden, Superintendent, Jailer, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF Missouri ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, petitioner should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

Instructions – Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as a basis for prosecution, and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the *original and one copy* must be mailed to the Clerk of the United States District Court whose address is _____

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Division 14, Circuit Court of St. Louis County, Missouri

2. Date of judgment of conviction: November 8, 1979

3. Length of sentence: Death

4. Nature of offense involved (all counts): Capital Murder

5. What was your plea? (Check one)
   (a) Not guilty [X]
   (b) Guilty [ ]
   (c) Nolo contendere [ ]

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)
   (a) Jury [X]
   (b) Judge only [ ]

7. Did you testify at the trial?
   yes [X] No [ ]

8. Did you appeal from the judgment of conviction?
   Yes [X] No [ ]

9. If you did appeal, answer the following:
   (a) Name of court: Supreme Court of Missouri

   (b) Result: Conviction and sentence affirmed

   (c) Date of result: February 9, 1980

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, Rule 27.26 motions or other motions with respect to this judgment in any court, state or federal?

    Yes [X] No [ ]

11. If your answer to 10 was "yes" give the following information:

    (a) (1) Name of court: Division 5, Circuit Court of St. Louis County, Missouri

        (2) Nature of proceeding: collateral attack of conviction pursuant to Supreme Court 27.26.

        (3) Ground raised: See Attached.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes [X] No [ ]

(5) Result: Motion pursuant to Supreme Court Rule 27.26 was denied.

(6) Date of result: August 22, 1984.

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes [ ] No [ ]

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition application or motion?

Yes [ ] No [ ]

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes [X] No [ ]

(2) Second petition, etc. Yes [ ] No [ ]

(3) Third petition, etc. Yes [ ] No [ ]

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: See Attached.

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

B. Ground Two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground Three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes [ ] No [X]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: Phillip Ayers, 500 Northwest Plaza, St. Louis, Missouri

(c) At trial: Phillip Ayers, 500 Northwest Plaza, St. Louis, Missouri

(d) At sentencing: Phillip Ayers, 500 Northwest Plaza, St. Louis, Missouri

(e) On appeal: Lon Hocker, 1 Fay Road, Woodshole, Massachusetts, and Richard H. Sindel, 15A N. Meramec, Clayton, Missouri

(f) In any post-conviction proceeding: Richard H. Sindel, 15A North Meramec, Clayton, Missouri

(g) On appeal from any adverse ruling in a post-conviction proceeding: Richard H. Sindel, 15A N. Meramec, Clayton, Missouri

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes [ ] No [X]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [ ] No [X]

(a) If so, give name and location of court which imposed sentence to be served in the

future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [ ] No [ ]

Wherefore, petitioner prays that the Court grant petitioner relief to which petitioner may be entitled in this proceeding.

/s/ Illegible
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

X _____
Signature of Petitioner

11. (3) Grounds Raised:

1) The trial court error in striking prospective jurors on the basis of their answers to questions concerning their religious and/or moral beliefs against the imposition of the death penalty for the reason that:

a) The venire person's answers were not unequivocal;

b) The question as propounded by the Prosecuting Attorney was confusing, misleading;

c) Striking for cause those venire persons resulted in a jury that was unrepresentative of the community and conviction-prone in violation of the Defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution.

2) In the process of selecting Petitioner's trial jury, venire members with conscientious objections to the death penalty were systematically excused for cause, with the result that Petitioner was denied:

a) Trial by a jury selected through fair procedures, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 10 and 18(a) of the Missouri Constitution;

b) Trial by a jury that was a representative cross-section of the community, as required by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 10 and 18(a) of the Missouri Constitution;

c) Trial by a jury that was impartial and was not biased in favor of the prosecution as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 10 and 18(a) of the Missouri Constitution;

d) Trial by a jury that reflected contemporary standards of decency in the assessment of the penalty of death as required by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 21 of the Missouri Constitution;

3) The trial court erred in allowing the prosecuting attorney in the penalty phase of the trial to argue the possibility of Petitioner's early release by commutation or pardon when:

a) There was no evidence to support such an argument;

b) Said argument tended to misdirect the attention of the jurors from the task at hand forcing them to speculate on future events.

c) The Prosecuting Attorney misstated what the law in the State of Missouri was;

d) The Prosecuting Attorney argued that the death penalty was necessary to insure [sic] that the Defendant would not be released to repeat the crime of murder.

4) The closing argument of the Prosecuting Attorney at the penalty phase of the trial deprived Defendant of a fundamentally fair trial and Due Process of Law by improperly commenting on:

a) Defendant's right to appeal;

b) Missouri's statutory provision for a mandatory review;

c) The possibility of commutation or pardon of Petitioner;

5) The closing argument of the Prosecuting Attorney at the penalty phase of the trial deprived Defendant of a fundamentally fair trial and due process of law by intentionally and unnecessarily inflamming and prejudicing the jury against the Petitioner. These inflammatory remarks related to:

a) Petitioner's alleged propensity to repeat his crime;

b) The necessity and need for the jurors to demonstrate their bravery and courage by assessing the penalty of death;

c) The State's exhortation to the jurors that the sentencing procedure is part of a war against crime and arguing that it was their jobs as jurors to do battle in this war by assessing the punishment at death and other inflammatory remarks.

6) At the time these arguments were made[,] it was within the admitted knowledge of the Prosecuting Attorney that said remarks were improper and inflammatory. These arguments were made for the purpose of obtaining the first death penalty punishment in the State of Missouri, [sic] and[,] in the words of the Prosecuting Attorney, to "break the ice" in the State of Missouri. This situation is further aggravated by the fact that the Prosecuting Attorney has stated that he realized at the time of posing these arguments, they were improper, suggestive and inflammatory.

7) The trial court erred in instructing the jury on aggravating circumstance (b)(7) when there is [sic] no evidence to support said instruction and no finding that the Petitioner had been the actual murderer.

8) Trial counsel rendered ineffective assistance of counsel at the guilt stage of the proceedings by:

a) Failing to object to inadmissible evidence;

b) Failing to properly employ the services of various experts and private investigators to assist in the preparation of a defense;

c) Failing to present to the jury adequate physical and demonstrative evidence necessary to insure [sic] to the jury a full understanding of the defense;

d) Failing to investigate and interview defense witnesses.

9) Trial counsel for the accused failed to render to the Defendant effective assistance of counsel at the penalty phase of the trial by:

a) Failing to object to the Prosecutor's argument or any portion of it;

b) Failing to properly preserve for appellate review flagrant trial abuses;

c) Failing to file necessary pre-trial motions;

d) Failing to investigate possible sources of mitigating evidence;

e) Failing to secure or attempt to secure witnesses on behalf of Defendant;

f) Failing to properly prepare for the penalty phase at trial;

g) Failing to familiarize himself with the laws surrounding Capital Murder and death penalty litigation.

10. Petitioner's death penalty is cruel and unusual punishment forbidden by the Eighth Amendment to the Constitution of the United States and Article I, Section 21 of the Missouri Constitution and further deprives him of Due Process of law and equal protection under the laws in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 2, 10,

and 18(a) of the Missouri Constitution for each of the following reasons:

a) Death is disproportionately severe and therefore an excessive punishment in Petitioner's case in view of the circumstances of the offense and Petitioner's character, record and life history;

b) The Missouri death penalty statute as interpreted and applied in Petitioner's case fails to allow a constitutionally adequate consideration of mitigating circumstances;

c) The instructions submitted to the jury failed to allow a constitutionally adequate consideration of mitigating circumstances;

d) The present Missouri death penalty procedures as applied since their enactment have resulted in arbitrary, capricious and patently unjust imposition of the death penalty and were applied to sentence this Petitioner to death in an arbitrary and invidious manner that is shocking to the conscience of a Court charged with the obligation to enforce the Eighth and Fourteenth Amendment principles and Article I, Section 21 of the Missouri Constitution;

e) Trial counsel for the accused failed to render Defendant effective assistance of counsel at both the penalty and guilt phases of the trial by failing to secure a proper and complete psychiatric examination of Defendant herein, and failing to insure [sic] that the psychiatrist appointed by the court did a complete and thorough job of examining the Defendant. This evidence could have and would have been useful to Defendant both at the

guilt phase of trial and would have been admissible as mitigating evidence at the penalty phase.

f) Under the present Missouri death penalty procedures, the death penalty is discriminatorily applied against Petitioner's ethnic minority extraction, defendant's accused of killing caucasians, and impoverished defendants and male defendants, upon the sole grounds of race, poverty and sex; and Petitioner's death sentence was imposed pursuant to this discriminatory pattern and practice;

g) The death penalty is unjustified as a means of achieving any legitimate governmental interest and is therefore excessive.

11. Imposition of a sentence of death in a case such as this, in which the Petitioner was not found to have taken life, or intended to take life, violates the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 10, 18(a) and 21 of Constitution of Missouri.

12. Allowing the Prosecuting Attorney to argue matters not admitted into evidence at Petitioner's sentencing trial and which constituted non-statutory aggravating circumstances, violated the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 21 of the Missouri Constitution.

13. Missouri statutory provisions and actual classes governing appellate review of death sentences:

a) Denied Petitioner the effective assistance of counsel;

b) Denied Petitioner a fundamentally fair hearing and a reliable determination of the issue of life or death;

c) Denied Petitioner of the effective assistance of counsel and basic tools for an adequate defense and appeal because of his indigency[,] all in violation of his rights as guaranteed to him by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

d) The death penalty is in fact administered and applied arbitrarily, capriciously and whimsically in the State of Missouri; Petitioner was sentenced to die and will be executed, pursuant to a pattern and practice of wholly arbitrary and capricious infliction of that penalty in violation of his rights guaranteed him by the Eighth and Fourteenth Amendments to the United States Constitution.

14. Instruction No. 9, the verdict director from this cause, directed a verdict of guilty of Capital Murder without requiring a finding of the ultimate fact that distinguishes this crime from all others, *i.e.*, that Defendant killed unlawfully, willfully, knowingly, deliberately and with pre-meditation [sic]. The instructions allowed the jury to infer the Defendant's intent from the acts state of mind of others and allowed the jury to transfer the intent of another to this Defendant [sic]. The instruction as tendered to the jury authorized the jury to presume that this Defendant acted unlawfully, willfully, knowingly, deliberately and with pre-meditation [sic].

15. The jury in this cause, because of the instructions of the Court, never found that the Defendant unlawfully, willfully, knowingly, deliberately and with

pre-meditation [sic] killed the victim[,] nor did they ever find that he had the mental state consistent with that alleged in the indictment and specified in the statute.

16. Instruction No. 9, as promulgated, violated Defendant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10; Article II, Section 1; and Article V, Section 5 of the Missouri Constitution.

17. Defendant was deprived of a fundamentally fair trial when the Prosecuting Attorney at the penalty phase of the trial commented and argued to the jury that their responsibilities as jurors was [sic] lessened because of the mandatory statutory review of a sentence of death[,] in violation of *Caldwell v. Mississippi*, 472 U.S. ___ 86 L.Ed.2d 231 (1985).

18. Instruction No. 21 denied to Defendant his rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution in that the instructions specifically limited those matters that the jurors could consider as mitigating in determining the sentence to be imposed in this case.

11. (3) Grounds raised:

1) The trial court erred in striking prospective jurors on the basis of their answers to questions concerning their religious and/or moral beliefs against the imposition of the death penalty for the reason that:

a) The venire person's [sic] answers were not unequivocal;

b) The question as propounded by the Prosecuting Attorney was confusing, misleading;

c) Striking for cause those venire persons resulted in a jury that was unrepresentative of the community and conviction-prone in violation of the Defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution.

Supporting Facts: 1) Venire person, Dally, (Supp. T. 12) Lange, (Supp. T. 26) and Marshall (T. 27)[,] as well as others[,] when questioned by the Prosecuting Attorney failed to indicate in their answers that their religion or moral scruples against the random imposition of the death penalty would justify their removal for cause in this case. Petitioner objected in a timely fashion to the jurors['] exclusion arguing that such was in violation of the *Witherspoon* rule.

Petitioner also relies on the studies cited in *Grigsby v. Mabry*, 758 F.2d 226 (1985). Petitioner was deprived of a representative cross-section of the community resulting in a jury that was conviction-prone. Social science evidence has demonstrated that jurors who lack scruples against capital punishment are more prone to resolve disputed issues of fact – such as the existence of aggravating circumstances – in favor of the State.

2) In the process of selecting Petitioner's trial jury, venire members with conscientious objections to the death penalty were systematically excused for cause, with the result that Petitioner was denied:

a) Trial by a jury selected through fair procedures, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United

States and Article I, Sections 10 and 18(a) of the Missouri Constitution;

b) Trial by a jury that was a representative cross-section of the community, as required by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 10 and 18(a) of the Missouri Constitution;

c) Trial by a jury that was impartial and was not biased in favor of the prosecution as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 10 and 18(a) of the Missouri Constitution;

d) Trial by a jury that reflected contemporary standards of decency in the assessment of the penalty of death as required by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 21 of the Missouri Constitution;

Supporting Facts: 2) See #1 above.

3) The trial court erred in allowing the prosecuting attorney in the penalty phase of the trial to argue the possibility of Petitioner's early release by commutation or pardon when:

a) There was no evidence to support such an argument;

b) Said argument tended to misdirect the attention of the jurors from the task at hand[,] forcing them to speculate on future events.

c) The Prosecuting Attorney misstated what the law in the State of Missouri was;

d) The Prosecuting Attorney argued that the death penalty was necessary to insure [sic] that the Defendant would not be released to repeat the crime of murder.

Supporting Facts: 3) During his closing argument in the penalty phase[,] the Prosecuting Attorney repeated[,] injected irrelevant considerations into the sentencing determination. These arguments had no bearing on Petitioner's character or record or the circumstances surrounding the murder for which he was convicted. The remarks were purposefully inflammatory and prejudicial and created a grave risk that the jury would be influenced to impose the death penalty out of fear and a sense of outrage, and not as a result of any direct findings concerning this particular Defendant or his acts.

The Prosecuting Attorney[,] during his closing argument[,] referred to his ten years as a prosecutor, advising the jury that during his employment with that office, he had never before requested the death penalty. This statement was misleading and irrelevant. There was a ten-year moratorium on the death penalty in Missouri. The purpose of such a statement was to establish that[,] unlike other [d]efendants that this prosecutor may have tried during that period of time[,] Movant *particularly* deserved the death penalty. Such an argument rendered the sentencing hearing in this case fundamentally unfair and constitutionally intolerable.

The prosecutor went on to exhort the jury to join him in a war against crime, improper statements which rendered the sentence in this case, [sic] fundamentally unfair and constitutionally intolerable.

The prosecutor directly commented on the statutory review of a sentence of death by the Supreme Court and indicated that only that penalty would be reviewed. This unnecessarily misled the jury and significantly diminished their sense of sentencing responsibility towards this petitioner, the Court and the community.

The prosecutor was allowed to comment on the possibility of pardon or commutation[,] as well as possible changes in the law which would authorize Newlon's eventual release. This was pure speculation on his part and invited the jury [to] likewise [speculate]. The remarks were inappropriate, irrelevant and misleading to the jury. Neither the prosecutor nor the court ever advised the jury that a death sentence[,] as well as a life sentence in prison without possibility of probation or parole[,] can be pardoned or commutated by the executive authority of the State.

The Prosecuting Attorney unnecessarily and intentionally personalized the jurors[,] arguing that "If Rayfield was [sic] going to harm your child[,] would you kill him? Would you have prevented this killing if you had been in the convenient [sic] store with a gun and you could have saved Mr. Dave's life? Would you have killed Rayfield? I think you would have [done] – at least I hope you would have had the courage to do either one of those. If you think you would have, kill him now, kill him now."

The Prosecutor's remarks were repeated and did not occur in isolation from each other. They were deliberate. The prosecutor knew they were highly improper, inflammatory and prejudicial. Kristy Green, a former Assistant Attorney General for the State of Missouri, advised counsel for the Petitioner that in a conversation [she had] with Westfall[,] he [Westfall] had indicated that he had made these statements to "break the ice" and obtain the first death penalty in the State of Missouri. This purpose is supported by the deposition of the Prosecuting Attorney and his testimony at the hearing in state court.

4) The closing argument of the Prosecuting Attorney at the penalty phase of the trial deprived Defendant of a fundamentally fair trial and Due Process of Law by improperly commenting on:

a) Defendant's right to appeal;

b) Missouri's statutory provision for a mandatory review;

c) The possibility of commutation or pardon of Petitioner;

Supporting Facts: 4) See #3 above.

5) The closing argument of the Prosecuting Attorney at the penalty phase of the trial deprived Defendant of a fundamentally fair trial and due process of law by intentionally and unnecessarily inflaming and prejudicing the jury against the Petitioner. These inflammatory remarks relating to:

a) Petitioner's alleged propensity to repeat his crime;

b) The necessity and need for the jurors to demonstrate their bravery and courage by assessing the penalty of death;

c) The State's exhortation to the jurors that the sentencing procedure is part of a war against crime and arguing that it was their jobs as jurors to do battle in this war by assessing the punishment at death and other inflammatory remarks.

Supporting Facts: 5) See #3 above.

6) At the time these arguments were made[,] it was within the admitted knowledge of the Prosecuting Attorney that said remarks were improper and inflammatory. These arguments were made for the purpose of obtaining the first death penalty punishment in the State of Missouri, and in the words of the Prosecuting Attorney, to "break the ice" in the State of Missouri. This situation is further aggravated by the fact that the Prosecuting Attorney has stated that he realized at the time of posing these arguments, they were improper, suggestive and inflammatory.

Supporting Facts: 6) See #3 above.

7) The trial court erred in instructing the jury on aggravating circumstance (b)(7) when there was no evidence to support said instruction and no finding that the Petitioner had been the actual murderer.

Supporting Facts: 7) The State's verdict [director] or Instruction No. 9, states as follows:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about April 24, 1978, in the County of St. Louis, State of Missouri, the defendant or another caused the death of Mansfield Dave by shooting him, and

Second, that the defendant or another intended to take the life of Mansfield Dave, and

Third, that the defendant or another knew that they were practically certain to cause the death of Mansfield Dave, and

Fourth, that the defendant or another considered taking the life on Mansfield Dave and reflected upon this matter coolly and fully before doing so, and

Fifth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs, then you will find the defendant guilty of Capital Murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of this offense.

The State argued that it was not necessary to find or determine that Rayfield Newlon had shot or intended to shoot or in any other way cause the victim's death, only that he entered the store with the intent to commit the robbery. During the penalty phase of the trial the jury implicitly found the Defendant was not the "trigger man" in this case.

8) Trial counsel rendered ineffective assistance of counsel at the guilt stage of the proceedings by:

a) Failing to object to inadmissible evidence;

b) Failing to properly employ the services of various experts and private investigators to assist in the preparation of a defense;

c) Failing to present to the jury adequate physical and demonstrative evidence necessary to insure [sic] to the jury a full understanding of the defense;

d) Failing to investigate and interview defense witnesses.

Supporting Facts: 8) The trial transcript and the transcript of the 27.26 hearing would demonstrate that counsel failed to object to what he perceived and knew to be inadmissible evidence. He was unable to offer any explanation for his failure to the State offered no evidence that would support that his silence was a strategic decision on his part.

Trial counsel himself would testify that he never at any time discussed with the Petitioner the bifurcated proceedings; the necessity of securing evidence in mitigation of his sentence; the names, addresses or other identifying characteristics of potential witnesses that could be called on his behalf; what evidence may or may not be considered as mitigating, as well as [what] strategy [was] to be used in an attempt to avoid the ultimate punishment.

Counsel would testify the he never discussed with any of Petitioner's family members, neighbors, teachers,

or others who would present evidence that would reflect favorably on Newlon's character, [Newlon's] mental abilities and other potentially mitigating factors.

Counsel failed to object to the arguments of the Prosecuting Attorney which were extremely inflammatory. He failed to familiarize himself with the laws and cases surrounding death penalty litigation. Because of this failure[,] he did not realize the expansive scope of mitigating evidence that was allowed to him and failed to object to instructions given to the jury which unnecessarily limited them to finding and determining the existence of mitigating factors.

9) Trial counsel for the accused failed to render to the Defendant effective assistance of counsel at the penalty phase of the trial by:

a) Failing to object to the Prosecutor's argument or any portion of it;

b) Failing to properly preserve for appellate review flagrant trial abuses;

c) Failing to file necessary pre-trial motions;

d) Failing to investigate possible sources of mitigating evidence;

e) Failing to secure or attempt to secure witnesses on behalf of Defendant;

f) Failing to properly prepare for the penalty phase at trial;

g) Failing to familiarize himself with the laws surrounding Capital Murder and death penalty litigation.

Supporting facts: 9) See #8 above.

10. Petitioner's death penalty is cruel and unusual punishment forbidden by the Eighth Amendment to the Constitution of the United States and Article I, Section 21 of the Missouri Constitution and further deprives him of due process of law and equal protection under the laws in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution for each of the following reasons:

a) Death is disproportionately severe and therefore an excessive punishment in Petitioner's case in view of the circumstances of the offense and Petitioner's character, record and life history;

b) The Missouri death penalty statute[,] as interpreted and applied in Petitioner's case[,] fails to allow a constitutionally adequate consideration of mitigating circumstances;

c) The instructions submitted to the jury failed to allow a constitutionally adequate consideration of mitigating circumstances;

d) The present Missouri death penalty procedures[,] as applied since their enactment[,] have resulted in arbitrary, capricious and patently unjust imposition of the death penalty and were applied to sentence this Petitioner to death in an arbitrary and invidious manner that is shocking to the conscience of a Court charged with the obligation to enforce the Eighth and Fourteenth Amendment principles and Article I, Section 21 of the Missouri Constitution;

e) Trial counsel for the accused failed to render Defendant effective assistance of counsel at both the penalty and guilt phases of the trial by failing to secure a proper and complete psychiatric examination of Defendant herein, and failing to insure [sic] that the psychiatrist appointed by the court did a complete and thorough job of examining the Defendant. This evidence could have and would have been useful to Defendant both [sic] at the guilt phase of trial and would have been admissible as mitigating evidence at the penalty phase.

f) Under the present Missouri death penalty procedures, the death penalty is discriminatorily applied against Petitioner's ethnic minority extraction, defendant's accused of killing caucasians, and impoverished defendants and male defendants, upon the sole grounds of race, poverty and sex; and Petitioner's death sentence was imposed pursuant to this discriminatory pattern and practice;

g) The death penalty is unjustified as a means of achieving any legitimate governmental interest and is therefore excessive.

Supporting Facts: 10) The decision of the Supreme Court strongly suggests that the Eighth and Fourteenth Amendments preclude the imposition of the death penalty upon an individual who has not taken life or intended a death of a victim. Throughout the proceedings no trier of fact has ever made an express finding that Petitioner either personally killed Mansfield Dave, the deceased[,] or intended to take his death [sic].

The physical evidence at the guilt trial pointed significantly to the fact the Petitioner did not kill Mansfield Dave.

11. Imposition of a sentence of death in a case such as this, in which the Petitioner was not found to have taken life, or intended to take life, violates the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 10, 18(a) and 21 of Constitution of Missouri.

Supporting Facts: 11) See #7 and #10 above.

12. Allowing the Prosecuting Attorney to argue matters not admitted into evidence at Petitioner's sentencing trial and which constituted non-statutory aggravating circumstances, [sic] violated the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 21 of the Missouri Constitution.

Supporting Facts: 12) See #8 above.

13. Missouri statutory provisions and actual classes governing appellate review of death sentences:

a) Denied Petitioner the effective assistance of counsel;

b) Denied Petitioner a fundamentally fair hearing and a reliable determination of the issue of life or death;

c) Denied Petitioner the effective assistance of counsel and basic tools for an adequate defense and appeal because of his indigency[,] all in violation of his

rights as guaranteed to him by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

d) The death penalty is in fact administered and applied arbitrarily, capriciously and whimsically in the State of Missouri; Petitioner was sentenced to die and will be executed, [sic] pursuant to a pattern and practice of wholly arbitrary and capricious infliction of that penalty[,] in violation of his rights guaranteed him by the Eighth and Fourteenth Amendments to the United States Constitution.

Supporting Facts: 13) See #7 and #10 above.

14. Instruction No. 9, the verdict director from this cause, directed a verdict of guilty of Capital Murder without requiring a finding of the ultimate fact that distinguishes this crime from all others, *i.e.*, that Defendant killed unlawfully, willfully, knowingly, deliberately and with pre-meditation [sic]. The instructions allowed the jury to infer the Defendant's intent from the acts state of mind of others and allowed the jury to transfer the intent of another to this Defendant [sic]. The instruction as tendered to the jury authorized the jury to presume that this Defendant acted unlawfully, willfully, knowingly, deliberately and with pre-meditation [sic].

Supporting Facts: 14) See #7 and #10 above.

15. The jury in this cause, because of the instructions of the Court, never found that the Defendant unlawfully, willfully, knowingly, deliberately and with

pre-meditation [sic] killed the victim[,] nor did they ever find that he had the mental state consistent with that alleged in the indictment and specified in the statute.

Supporting Facts: 15) See #7 and #10 above.

16. Instruction No. 9, as promulgated, violated Defendant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10; Article II, Section 1; and Article V, Section 5 of the Missouri Constitution.

Supporting Facts: 16) See #7 and #10 above.

17. Defendant was deprived of a fundamentally fair trial when the Prosecuting Attorney[,] at the penalty phase of the trial[,] commented and argued to the jury that their responsibilities as jurors was [sic] lessened because of the mandatory statutory review of a sentence of death[,] in violation of *Caldwell v. Mississippi*, 472 U.S. ___ 86 L.Ed.2d 231 (1985).

Supporting Facts: 17) See #3 through #6 above.

18. Instruction No. 21 denied to Defendant his rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution in that the instructions specifically limited those matters that the jurors could consider as mitigating in determining the sentence to be imposed in this case.

Supporting Facts: 18) Instruction No. 21 reads as follows:

> If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 20, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question[,] you may consider all of the evidence relating to the murder of Mansfield Dave.
>
> You may consider,
>
> 1. Whether the defendant was an accomplice in the murder of Mansfield Dave and whether his participation was relatively minor.
>
> 2. Whether the defendant acted under extreme duress or substantial domination of another person.
>
> 3. The age of the defendant at the time of the offense.
>
> If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

The instruction unconstitutionally limited the jury's consideration of mitigating evidence[,] in violation of *Lockett v. Ohio,* 488 U.S. 586, 1978.

Rayfield NEWLON, Plaintiff-Appellant,

v.

STATE of Missouri,
Defendant-Respondent.

No. 49216.

Missouri Court of Appeals,
Eastern District,
Division Two.

Jan. 21, 1986.

Motion for Rehearing and/or Transfer
Denied Feb. 25, 1986.

Application to Transfer Denied
March 25, 1986.

REINHARD, Judge.

Movant appeals from the denial of his Rule 27.26 motion after an evidentiary hearing. We affirm.

Movant was convicted of capital murder after a jury trial and sentenced to death. His conviction was affirmed on direct appeal by the Missouri Supreme Court in *State v. Newlon*, 627 S.W.2d 606 (Mo. banc 1982), *cert. denied*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982), which contains a discussion of the murder. Movant's second amended 27.26 motion contains numerous allegations of constitutional infirmities in regard to his sentence which we categorize as follows: 1) allegations pertaining to the jury selection process and the Missouri death penalty statute; 2) allegations concerning the state's argument during the sentencing phase of the trial; 3) allegations regarding the jury instructions on aggravating and mitigating circumstances; and 4) allegations of ineffective assistance of counsel at trial. After a hearing, at which

movant did not testify, the hearing court denied the 27.26 motion. Movant raises twelve points on appeal, which will be enumerated as appropriate in the discussion.

Movant's first contention is that the trial court erred in striking for cause prospective jurors "on the basis of their answers to questions concerning their religious and/or moral beliefs against the imposition of the death penalty" because their responses were equivocal and because the prosecuting attorney's voir dire questions on those subjects were "confusing, misleading, and incorrect statements of law." Movant's allegations specifically focus on venirewoman Daily and venireman Schlattman. We initially note that similar complaints were made on direct appeal, where the responses of three veniremen, including Mrs. Daily, were examined by the Supreme Court and found to be unambiguous. We will not reconsider contentions rejected in the original appeal in this post-conviction proceeding under Rule 27.26. *Hatfield v. State*, 784 S.W.2d 574, 575 (Mo.1972). Although venireman Schlattman's excusal was not challenged on direct appeal, he clearly stated he could not follow the court's instructions on the range of punishment if the death penalty were included. The trial court's ruling was therefore consistent with *Wainwright v. Witt*, ___ U.S. ___, ___, 105 S.Ct. 844, 851-852, 83 L.Ed.2d 841, 852 (1985). In addition, our examination of the record has disclosed no basis for relief in the prosecuting attorney's voir dire examination. Movant's Point I is without merit.

In Point II movant contends that the hearing court "erred in rejecting consideration of [movant's] claim that the imposition of the death penalty on the [movant] is cruel and unusual punishment forbidden by the Eighth

Amendment to the Constitution of the United States . . . and further deprives him of due process of law . . . " These same contentions were raised by movant on direct appeal and were rejected by the Missouri Supreme Court in *State v. Newlon*, 627 S.W.2d at 606.

Points III and IV raise allegations of misconduct concerning the prosecuting attorney's argument during the trial's penalty phase. The Missouri Supreme Court considered the remarks complained of on direct appeal, reviewing them under the plain error doctrine. *Id.* at 616-620. After setting forth the portions of argument movant objects to, the Court determined that no plain error had been committed by the trial court in failing to declare a mistrial; and an examination of the Court's opinion, as well as its analysis of movant's allegations, reveals that no error whatsoever was divined. The prosecutor's argument did not deprive movant of a fundamentally fair trial.

We next consider Points VI, VII, and VIII, which concern rulings regarding the testimony of two witnesses called by movant at the motion hearing: Father John Kavanaugh and Dr. James Gilsanin. Movant sought to introduce testimony from Father Kavanaugh concerning the Bible's prohibition against capital punishment and the American Catholic Bishops' objection to the death penalty. The hearing court found this testimony irrelevant. Dr. Gilsanin, a Professor of Urban Affairs at St. Louis University, testified, *inter alia*, about the deterrent effect of the death penalty. The hearing court sustained the state's objection to [this] testimony based upon studies not available at the time of movant's murder trial. The court later found that the portion of Dr. Gilsanin's

testimony regarding the death penalty's deterrent value was irrelevant. We find no error in the hearing court's rulings on the testimony of these two witnesses. Had that testimony been offered and excluded at the penalty phase, the trial court would not have committed error. In *State v. Gilmore*, 681 S.W.2d 934 (Mo. banc 1984), Gilmore contended that he was unable to adequately prepare a defense due to the trial court's refusal to appropriate funds for witnesses, including Dr. Gilsanin. The Court found no error, stating:

> The only witness specifically identified was Dr. James Gilsanin, a professor of sociology, who was to testify as to the deterrent value of the death penalty. It is aphoristic that the sentencing phase of the trial is not designed to serve as a forum for a general debate on the attributes of capital punishment. The bifurcated procedure was devised to avoid the imposition of the death sentence in an arbitrary and capricious manner. *However, it is apparent from defendant's motion that Dr. Gilsanin's testimony would not have focused upon the specifics of the defendant's case and, therefore, would not have assisted the jury in imposing a rational sentence.*
>
> This Court has recognized that the death penalty serves the legitimate purposes of retribution and incapacitation, and the legislature may find that the penalty serves the purpose of deterrence. Therefore, the trial court's decision to refuse funds for the employment of an expert witness, whose testimony was irrelevant to the issue at hand, was not erroneous. The fact that another trial court might have been more gratuitous in Leonard Laws' case in permitting the presentation of Dr. Gilsanin's testimony does not make the trial court's ruling error in this instance. (citations omitted) (emphasis ours).

Id. at 941. Neither the testimony of Father Kavanaugh nor that of Dr. Gilsanin would have focused on the specifics of this case, [sic] and therefore would have been irrelevant. Having discerned no error, we need not rule on the state's claim that errors or defects in Rule 27.26 proceedings present no reviewable issue under Missouri law. *See, State v. Brown*, 633 S.W.2d 301 (Mo. App. 1982).

In Point IX movant contends that "the court erred in rejecting Dr. Gilsanin's testimony concerning studies which have concluded that persons who are death qualified pursuant to *Witherspoon v. Illinois* [391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)] are more likely to find defendants guilty of capital crimes than persons who are not so qualified." In Point X, movant alleges that the hearing court erred in rejecting movant's claim that his jury was guilt prone and unrepresentative of the community. Movant relies on *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir.1985), *cert. granted sub nom. Lockhart v. McCree*, ___ U.S. ___, 106 S.Ct. 59, 88 L.Ed.2d 48 (1985), to support these contentions. However, we are bound by the long line of Missouri Supreme Court decisions contrary to movant's position. *See, e.g., State v. Bannister*, 680 S.W.2d 141, 146 (Mo. banc 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1879, 85 L.Ed.2d 170 (1985). Movant's Points IX and X are clearly without merit.

Points XI and XII present allegations concerning the instructions submitted to the jury on aggravating and mitigating circumstances. Movant simply attempts to relitigate issues regarding the aggravating circumstances instruction. We will not consider those contentions in this

proceeding. *Hatfield*, 487 S.W.2d at 575. In Point XI, however, movant raises a challenge to the mitigating circumstances instruction which was not addressed on direct appeal.

The challenged instruction, No. 21, reads as follows:

> If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 20, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. *In deciding that question you may consider all of the evidence relating to the murder of Mansfield Dave.*
>
> You may *also* consider,
>
> 1. Whether the defendant was an accomplice in the murder of Mansfield Dave and whether his participation was relatively minor.
>
> 2. Whether the defendant acted under extreme duress or substantial domination of another person.
>
> 3. The age of the defendant at the time of the offense.
>
> If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence. (emphasis ours).

Movant contends that this instruction improperly limited the jury's consideration of mitigating circumstances.

We initially note that instructional error is ordinarily not a matter to be reviewed under Rule 27.26. *Cherry v. State*, 660 S.W.2d 361, 363 (Mo.App.1983). However, we find no error in the challenged instruction which could perceivably [sic] have prejudiced movant. The emphasized portion of the instruction indicates that it does not violate the U.S. Supreme Court's mandate that the sentencer "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973, 990 (1978). The jury was instructed to consider *all* the evidence in balancing mitigating and aggravating circumstances. Furthermore, the jury was also instructed that they were not compelled to fix death as the punishment, "even if [they] decide that a sufficient mitigating circumstance or circumstances do not exist." Movant's Points XI and XII are also without merit.

We perceive movant's principal allegation to be that he received ineffective assistance of counsel at trial, as set forth in Point V of his brief.

It appears that movant has no real complaint regarding counsel's performance during the guilt phase of the trial. In his brief he states:

> Clearly, there was a discrepancy between Mr. Ayers' ability to handle the penalty phase of this case and the manner in which he tried the guilt portion. Counsel's total lack of investigation, initiative, conceptualization, and witness preparation and consultation concerning strategies to be employed at the penalty phase, are

> glaring failures as compared to his shortcomings during the guilt phase.[1]

He contends that "investigation on the part of defense counsel would have revealed the availability of evidence the witnesses who could have demonstrated to the jury factors that would substantially effect (sic) their decision in imposing the penalty of death."

Defense counsel testified at the 27.26 hearing that he was licensed to practice law in 1974, and served as Stoddard County Prosecuting Attorney from January 1975 until November 1977, during which time he tried 50 to 60 cases. He also worked briefly for the Cape Girardeau Prosecuting Attorney's office, and in January 1978 entered into a general private practice in St. Louis County.

Defendant's trial, in July 1979, was only the second or third capital murder trial in Missouri under the new statute providing for bifurcated proceedings. Counsel testified that he took measures to familiarize himself with

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[1] We also note that movant told his attorney in the court's presence, while waiting for the jury to return a verdict on the sentence, that:

> I am completely satisfied and feel that you represented me to your utmost. I felt even if I had paid an attorney I couldn't have gotten a better job, [sic] than the job you have done, and I am completely satisfied. You have helped me prove my innocence, – and until such time I can have my Motion for New Trial to prove my innocence. I have been satisfied with you[r] representing me, and I would like to have you as my Defense Attorney on my Motion for New Trial, [sic] if that is in any way possible?

the new law, including observing the penalty phase of the murder trial in *State v. Downs*, 593 S.W.2d 535 (Mo.1980) at which no additional evidence was adduced by either side during the penalty phase. He also consulted with another attorney who had substantial criminal law experience and obtained information from the A.C.L.U. regarding capital murder trials. In addition to these measures, counsel engaged an investigator to assist him in locating witnesses and formulating a defense. Counsel requested that movant provide him with a list of possible witnesses, [sic] and testified that he followed up on all leads.

At the penalty phase of movant's trial, counsel focused in his argument on two mitigating factors: movant's youth and his allegedly minor participation in the crime. The murder victim died of shotgun wounds inflicted upon him during a robbery. The evidence indicated that movant and two other men were involved in the crime. However, counsel tried to impress upon the jury perceived weaknesses in the testimony which indicated that movant was the "trigger man" and attacked the credibility of the state's witnesses. Counsel testified that he felt this strategy would be effective, noting that the jury had deliberated for 7-8 hours on the question of guilt. Neither the state nor defense counsel called witnesses during the penalty phase. Counsel said that movant had presented him with three different versions of the crime, and "didn't help himself at all" during his testimony at the guilt phase. Counsel did consider calling the prison employees who are responsible for implementing the death sentence, but rejected this idea because "the only thing they could tell the jury was about death."

Movant contends that several witnesses should have testified during the penalty phase, including his mother, a sister, an aunt, a neighbor, a former girlfriend, a former teacher and a former police officer.[2] These witnesses testified at the 27.26 hearing that they could have told the jury about movant's impoverished background, his mental "slowness" and that movant was basically a "follower." Counsel endorsed one of these witnesses, Helen Tillman, who was movant's aunt and a close friend of the family. However, he stated that Mrs. Tillman was uncooperative and refused to testify at the trial.

Most of these witnesses had no information regarding the crime, and indeed their testimony indicates that their knowledge of movant was incomplete. For example, only two witnesses were aware of movant's prior convictions. In addition, all had connections with movant that could indicate bias, and their testimony was somewhat inconsistant.[3]

In order for movant to prevail, he must demonstrate that counsel "fail[ed] to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances and that he was prejudiced thereby." *Seales v. State*, 580 S.W.2d 733, 736

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[2] John Parker, the former police officer, testified at the guilt phase of the trial, but was not called during the penalty stage.

[3] For example, Janet Bradford, a former girlfriend, testified that she had seen movant behave violently and said that he knew how to "take care of himself." Mrs. Tillman testified that movant's mother refused to admit that her children got into trouble.

(Mo. banc 1979). Furthermore, "[w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balancing of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, ___, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674, 694 (1984). In determining the effectiveness of counsel in this case, the recent vintage of the capital murder statute is a factor to be considered. In *Foster v. Strickland*, 517 F.Supp. 597, 604-605 (N.D.Fla.1981) the court noted that " . . . the totality of the circumstances included a new [death penalty] statute." The court further observed that:

> Another lawyer may have done it differently. Another lawyer may have done it better. Another lawyer may have done it worse. But [counsel] was not ineffective.

Id. at 605.

Here counsel followed a procedure he believed would be effective. The fact that some other attorney might have presented the evidence now proposed by movant does not make counsel's failure to do so a breach of his duty to render competent assistance. We also are not convinced that the introduction of such evidence would have produced a different result.

Under the circumstances, we cannot conclude that movant was deprived of effective assistance of counsel.

Judgment affirmed.

DOWD, P.J., and CRIST, J., concur.

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY
OF ST. LOUIS
STATE OF MISSOURI

RAYFIELD NEWLON,	)	
Movant,	)	Cause No. 483247
vs.	)	Division No. 5
STATE OF MISSOURI,	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

This matter comes before the Court on movant's motions under Supreme Court Rule 27.26 to vacate the judgment and sentence in Cause No. 411964, *State v. Rayfield Newlon*.

The Court takes judicial notice of its own records, and, having been fully advised in the premises and having considered the record, the testimony and the evidence heard and entered in the record, addresses the allegations raised by movant's motions as presented and amended.

I

The Court with respect to paragraphs numbered 8A(a) and (b), 8C(a)-(e), 8(E), 8(F)(a-d), 8(G)(a-c)(d)(1-3), and 8(H) finds that these issues were addressed on appeal and consequently cannot be entertained in this proceeding.

II

The Court with respect to paragraph numbered 8(I)(a)c(b) finds that these issues were neither raised at trial nor on appeal and may not be raised for the first time at this proceeding. The Court notes counsel addressed certain aspects of the instructions given during the sentencing phase on direct appeal[,] and therefore[,] the Court further finds that any additional challenges to the instructions were deliberately by-passed and will not be entertained by this Court. The instruction as given was not violative of defendant's rights under the Missouri and United States Constitutions.

III

The Court with respect to paragraphs numbered 8D, 8(G)(d)(4) and 8(N) finds that the issues raised are not supported by the records of the trial in these proceedings. The Court finds no evidence of deliberate prosecutorial misconduct. The Court finds that a psychiatric examination of petitioner was conducted[,] and while it pointed to some mental deficiencies[,] it was neither favorable to defendant nor adequate to support a legal defense.

IV

The Court with respect to paragraphs 8(L)(a-c), 8(M) finds that the issues raised are not supported by any evidence or by any case law. Missouri's death penalty statute has been upheld and is not in derivation of the

Eighth and Fourteenth Amendments of the United States Constitution.

V

It is evident from the testimony that trial counsel still feels strongly about the defendant's innocence. Nevertheless the Court finds defendant received effective assistance of counsel at the guilt and penalty phases of his trial.

The Court finds specifically:

1. That counsel carried out pretrial investigation both as to the law and to the facts. Counsel secured the assistance of an investigator and through him checked into information provided by the defendant. (T. 263, 265, 339, 340, 342). With respect to the law and procedure, counsel secured written as well as practical advice. (T. 262, 311, 312, 336-338).

2. That counsel sought to locate "family" witnesses[,] but received no cooperation from Hellen Tillman or movant's father. Neither defendant nor anyone else provided the names of any other family members (T. 305-309, 311, 344, 345, 350). The Court rejects Mrs. Tillman's subsequent testimony to the contrary.

3. That trial counsel's decision not to have the defendant testify at the penalty stage was reasonable in light of his performance during the trial in chief. (T. 345, 346) (Trial T. 466-515).

4. That defendant continually supplied his attorney with conflicting versions of the events of that night. (T. 339-341).

5. That counsel's conduct of the trial was based upon a reasoned strategy after reasonable investigation.

6. That under the circumstances[,] counsel's efforts at the sentencing phase were not ineffective and that his evaluation of the jury at the sentencing phase was not unreasonable. (T. 349).

7. The Court finds no evidence or reason to believe that those witnesses which movant now claims were willing and able to testify at the sentencing phase would have been convincing or altered the outcome. None of them knew about the facts or circumstances of the crime, or even the defendant's arrest for this murder. None were familiar with movant's prior criminal history.

8. The Court finds that the testimonies of Dr. Gilsanin (as to sentence) and Father Kavanaugh are [not] and were not relevant.

9. The Court finds that counsel chose deliberately to refrain from objecting during closing argument at the sentencing phase[,] believing that the prosecutor had [committed] or would commit reversible error. (T. 350). The Court finds that this was a strategic choice, [sic] and, while risky, not evidence of ineffectiveness.

VI

With respect to the issues raised in paragraphs 8(A)(C) and 8(B)(1-4) the Court finds that it is unpersuaded by the testimony of Dr. Gilsanin. The Court[,] after a review of state and federal case law, and, after a review of the testimony presented[,] rejects the claim that the jury was guilt[-]prone and unrepresentative of the community.

VII

For the reasons set forth above, movant's allegations contained in his petition and amended petitions are ruled adversely to and against movant.

Wherefore, it is ordered, adjudged, and decreed by the Court that movant's motions to vacate, set aside or correct sentences under Supreme Court Rule 27.26 are overruled, denied and dismissed.

/s/ Arthur Litz
Arthur Litz, Judge
Division 5
St. Louis County Circuit Court

STATE of Missouri, Respondent,

v.

Rayfield NEWLON, Appellant.

No. 61798.

Supreme Court of Missouri,
En Banc.

Feb. 9, 1982.
Rehearing Denied March 9, 1982.

RENDLEN, Judge.

Appellant stands convicted of capital murder, § 565.001, RSMo 1978, by a jury which, in the punishment phase of trial, § 565.006, RSMo 1978, fixed the penalty at death, § 565.008, RSMo 1978, and judgment was rendered accordingly. Direct appeal to this Court lies in such cases for consideration of the punishment assessed, § 565.014, RSMo 1978, as well as the several claims of error. Art. V, § 3, Mo.Const.

For his assignments of error appellant asserts: (1) facial invalidity of the death penalty; (2) improper excuse for cause of three veniremen expressing an unwillingness to consider imposition of the death penalty; (3) prejudice in the verdict directing instruction which failed to require a finding of the mental state necessary for capital murder; (4) failure of the trial court to *sua sponte* control prosecutorial comment; (5) improper limitation of impeachment of a State's witness; and (6) impermissible vagueness and misapplication of § 565.012.2(7), RSMo 1978, on which the punishment was predicated, rendering the sentence a nullity.

From the substantial evidence adduced supportive of the verdict[,] the jury could reasonably have found the

following: On April 24, 1978, at approximately 10:20 p.m., Mr. Mansfield Dave sent his wife and son home from the "Quick Shop" "convenience" store they operated as a family in Kinlock. About twenty minutes later, an alarm sounded alerting Mrs. Dave to possible trouble at the store[,] and when she ran there, she found her husband on the floor[,] dead or dying from two shotgun wounds in the upper body.

This steady flow of events that fateful April 24 led to Mansfield Dave's murder. Earlier in the day appellant brought a single-shot 16-gauge shotgun to the home of Walter West, a friend of appellant['s] for more than 10 years. At appellant's request, West brought him a hack-saw[,] which they used to saw off portions of the barrel and the stock. The shotgun[,] so shortened[,] measured about 22 inches and could be concealed beneath a short jacket or inserted barrel first in the waistband of a man's trousers with a shirt or jacket over the stock. Leaving the home[,] they walked along a back road to a liquor store, and on the way appellant, who had seven or eight shells in his pocket, test-fired the gun into some weeds. During this time appellant suggested they rob Mr. Dave's "conveniency" store because he wanted "some money". Reaching the liquor store, appellant, who had concealed the gun in his heavy fur-trimmed jacket which extended to his mid-thigh, bought a six-pack of beer, and as they left, West flagged down a passing car driven by Franz Williams, another friend who had attended school with appellant through the seventh grade. The two men entered Williams' car, and when they told him of the robbery plan, Williams agreed to join the scheme. With Williams driving, the trio went to Mr. Dave's Quick

Shop[,] where West, apparently to size [up] the situation, entered the store, bought a pack of cigarettes and returning to the car reported there were too many people present to carry out the robbery at that time. The men drove back to the liquor store and purchased another six-pack of beer, then continued cruising the neighborhood in Williams' car.

At approximately 10:30 p. m., the three conspirators again drove to the victim's store and found the customers had gone. Only Mr. Dave remained. Williams and appellant then entered the store while West, who remained in the car, drove to a place in front of the building to permit a view of the store's interior. Williams went toward a soda case in the rear as appellant walked to the sales counter behind which Mr. Dave was standing. Above that counter, plexiglass panels formed a partial physical, though not a visual, screen for the back counter area. Appellant, [sic] stationed himself at a point where an opening occurred in the screen and there confronted Mr. Dave[,] who[,] after a moment's conversation, turned his back[,] apparently to get cigarettes from a rack. It was then that appellant drew the sawed-off shotgun concealed in his clothing and aimed at his victim. As Mr. Dave turned back toward the counter, appellant[,] with a blast from the shotgun[,] knocked him to the floor. Appellant then deliberately broke open the single-action gun, extracted the spent shell, reloaded[,][1] and[,] peering over the counter with Williams, who had by then come to the

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[1] These activities were described in a general way by witness West. The details of the gun, its mechanism and the operations of loading, hand-cocking and extracting the shells were determined from a full examination of the exhibits.

front of the store, once more hand-cocked the gun, took aim and again shot Mr. Dave. He again broke open the gun, extracted the second spent shell and followed Williams from the store. Once outside the two ran in different directions[,] but were shortly picked up by West in the car[,] and as appellant reentered the car[,] he stated that he had to "burn" (kill) Mr. Dave. Though the robbery plan failed, as no money was taken from the store, the murder succeeded when Mr. Dave died from the wounds, one in the upper left chest and the other in the upper left shoulder.

After Mrs. Dave heard the alarm[2] and was running [sic] to the store, she saw Williams and noted he was not carrying an object of any kind, which is corroborative of the testimony that appellant (not Williams) had the gun and did the killing. The police were promptly summoned to the scene and in their investigation found two spent 16-gauge shotgun shells and, sitting on the counter, a cold bottle of Nehi orange soda bearing William's fingerprints. This[,] too[,] corroborates the testimony that Williams had gone to the rear of the store to get the soft

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[2] The alarm which brought Mrs. Dave to the store was heard by West shortly after the second shotgun blast. Though counsel suggests on appeal that Mr. Dave's conduct (which included activating the alarm) might have caused the shooting, appellant[,] in his statements to the police, made no mention of the alarm, and in his trial testimony claimed he was not present at the scene, belying counsel's argument. When Mrs. Dave reached her husband after the shooting, he was prone behind the counter with a gun (apparently a pistol) partially exposed in his pocket. Nothing in the record, however, supplies a possible nexus to the killing.

drink from the case while appellant confronted and shot Mr. Dave at the counter near the front. The night after the homicide, appellant delivered the shotgun to West's home where West applied some tape on the shortened stock which had loosened, and later asked his cousin, Kevin Hughes, to take the gun from the house. Hughes did so, but[,] apparently apprehensive of the situation, delivered the gun to Chief Patton of the Kinlock Police and was paid $24. Defense counsel characterized Hughes to the jury as the "little snitch."

The police in their later investigation found the sawed-off portions of the barrel and stock at West's house and determined the shotgun was the weapon which had fired the two spent cartridges found at the murder scene.

Appellant was[,] at the time of the murder[,] a 23-year-old black man, with an 11th grade education. He had four convictions of burglary second degree, three convictions of stealing and one conviction of larceny. Though, [sic] the record is unclear how much total time was imposed[,] his sentences totaled at least 12 years[,] and perhaps more. Appellant had served part of this time in the penitentiary. In an initial statement to the police, he admitted his presence at the scene but contended he had stayed in the car while West and Williams went inside the store. He later made a videotaped statement and changed his story, admitting that Williams and *indeed he* had entered the store[,] but [he] asserted that Williams did the shooting while he, appellant, went to the soda case at the rear of the store. In this videotaped statement he also admitted he knew [that] the purpose of their entering the store was to carry out a "heist" (robbery)[.] and in this statement he also asserted that Franz Williams[,] while

standing near the car before entering the store stated that "I [Franz Williams] might have to shoot him [Mr. Dave] because he knows me". Thus the possibility of killing Mr. Dave to eliminate any witness was implicitly a part of the plan. In this connection it is important to note that appellant knew the "place", that he had been in the store on prior occasions and was familiar with the store and some of the people who worked there. He knew the store was close by and that the men could "walk" to it. Easy accessibility appears to have been a consideration in choosing that store to rob, all of which suggests that destroying the witness was a motive for the killing. At trial, again changing his story, appellant stated he was not present at the scene of the crime.

I.

Appellant contends that the death penalty authorized by § 565.008, RSMo 1978, is unconstitutional under the United States and Missouri Constitutions. When considering such "statutory validity" challenges[,] we are mindful that our legislature's enactments generally enjoy a presumption of constitutionality and will be declared void only when manifestly infringing a constitutional provision. *State v. Hamey*, 168 Mo. 167, 67 S.W. 620, 628 (Mo. banc 1902). *See also, State v. Mitchell*, 563 S.W.2d 18, 26 (Mo. banc 1978). In any determination as to constitutionality of legislatively prescribed punishment, validity is presumed[,] and those seeking invalidation are heavily burdened to demonstrate it as barberous or excessive. *State v. Higgins*, 592 S.W.2d 151, 155 (Mo. banc 1979), *app. dismissed*, 446 U.S. 902, 100 S.Ct. 1825, 64 L.Ed.2d 254

(1980). Attentive to these principles we examine appellant's contentions. First: that the death penalty violates the cruel and unusual punishment clause of the Eighth Amendment and the due process provision of the Fourteenth Amendment. This assertion runs contrary to the decisions of the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 169, 96 S.Ct. 2909, 2923, 49 L.Ed.2d 859, 872 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247, 96 S.Ct. 2960, 2964, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 268, 96 S.Ct. 2950, 2954, 49 L.Ed.2d 929 (1976). The Court in *Gregg*[,] reviewing the Georgia statutes' death sentence provisions[,] found them constitutional. The analysis there is appropriate in this challenge to Missouri's statute which[,] in essential part[,] tracks that of Georgia[,] leaving little doubt that our death sentence provisions, properly imposed, are sound under the Federal Constitution and we so hold.

Second: Appellant, without supporting authority, suggests the death penalty is violative of the cruel and unusual punishment provision of Art. I, § 21, and [the] due process provision of Art. I, § 10, of the Missouri Constitution. We declared § 565.008, RSMo 1978, valid against such attack under Art. I, § 21, in *State ex rel. Westfall v. Mason*, 594 S.W.2d 908, 916-17 (Mo. banc 1980), *vacated on other grounds, Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). In so deciding[,] we refused to extend the reach of Art. I, § 21[,] as requested, and arrogate to ourselves a policy decision properly within the legislative province. Similarly[,] we now refuse to stretch the meaning of Art. I, § 10[,] to invalidate the death penalty, [sic] beyond the limits of the due process requirements of the Fourteenth Amendment

to the U.S. Constitution. More recently[,] in *State v. Mercer*, 618 S.W.2d 1 (Mo. banc 1981), *cert) denied*, ___ U.S. ___, 102 S.Ct. 432, 70 L.Ed.2d 240, this Court reviewed the application of Missouri's capital murder statutes and[,] affirming the conviction and death sentence there imposed, necessarily accepted the facial constitutionality of the death penalty provisions.

Third: Appellant maintains that the death penalty is prohibited by the Missouri Constitution, Art. I, § 2, which provides:

> *That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry;* that all persons are created equal and are entitled to equal rights and opportunity under the law; *that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.* (Emphasis ours).

This novel proposal requires a strained construction of that section[,] contrary to its obvious intendment. Without question the State of Missouri is not prohibited by this section from imposing the death penalty on depraved murderers. Instead the State is charged with conferring "security" for the "life" and "happiness" of its citizens generally. Such is the thrust of the section and if "government" fails in these things (*e.g.*, providing a deterrent to murder) and does not "confer this security, it fails in its chief design." Further, the strained construction here proposed flies in the face of the following related constitutional provisions by which the framers of our Constitution demonstratively intended the *death penalty could and would be imposed in appropriate cases.* Art. I, § 10:

" . . . no person shall be deprived of *life*, liberty or property without due process of law." (Emphasis ours). Art. I, § 19: "That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of *life* or liberty for the same offense, after being once acquitted by a jury; . . . " (Emphasis ours). Art. I, § 20: " . . . all persons shall be bailable by sufficient sureties, except for *capital offenses*, when the proof is evident or the presumption great." (Emphasis ours).

In light of the clear intent of Missouri's Constitution and the extraordinary increase of murder, accompanied all too frequently by incidents of cold brutality exceeding the pale of a civilized people, we hold that § 565.008, RSMo 1978, violates neither Sections 2, 10 or 21 of Art. I of the Missouri Constitution.

II.

We turn now to appellant's contention that the trial court committed plain error by its Instruction No. 9. This allegation of error was not raised in appellant's motion for new trial. It is raised for the first time in appellant's brief and will be reviewed for plain error under Rule 29.12. In submitting the issue of appellant's guilt of capital murder as an accessory, the trial court gave, among others, the following instructions:

INSTRUCTION NO. 5 – MAI – CR 2.10

All person are guilty who knowingly act together with the common purpose of committing an offense, or who knowingly and intentionally aid or encourage another in committing it, and whatever one does in furtherance of the offense is the act of each of them.

The presence of a person at or near the scene of an offense at the time it was committed is alone not sufficient to make him responsible therefor, although his presence may be considered together with all of the evidence in determining his guilt or innocence.

INSTRUCTION NO. 8 – MAI – CR2d 2.14

In this case you will be instructed that you may find the defendant either not guilty of any offense or guilty of either capital murder, murder in the first degree, murder in the second degree or manslaughter. In that connection you are instructed that when two or more persons are criminally responsible for an offense which is divided into degrees, each such person is guilty of that degree which is compatible with that state of mind with which he acted in committing the offense and compatible with his own accountability for any aggravating or mitigating fact or circumstance.

INSTRUCTION NO. 9 – MAI – CR2D 15.02, MODIFIED BY MAI-CR 2.12

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about April 24, 1978, in the County of St. Louis, State of Missouri, the defendant or another caused the death of Mansfield Dave by shooting him, and

> Second, that the defendant or another intended to take the life of Mansfield Dave, and
>
> Third, that the defendant or another knew that they were practically certain to cause the death of Mansfield Dave, and
>
> Fourth, that the defendant or another considered taking the life of Mansfield Dave and reflected upon this matter coolly and fully before doing so, and
>
> Fifth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs, then you will find the defendant guilty of capital murder.
>
> However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

Appellant charges plain error in the form of Instruction No. 9. The murder occurred [on] April 24, 1978, and at that time the statute in effect was § 565.001, RSMo 1978, proscribing certain acts as capital murder. In connection with the capital murder statute[,] instruction MAI-CR2d 15.02 was promulgated for trials of homicides occurring after May 25, 1977. Also in effect at the time of the murder was § 556.170, RSMo 1969, delineating responsibilities of accessories to murder and prescribing the punishment for their conduct. MAI-CR 2.12 was promulgated as its accompanying instruction. In sum, these statutes and their corollary instructions were those in vogue for crimes committed on April 24, 1978, the time of the murder. *See, State v. Lute*, 608 S.W.2d 381, 383 (Mo. banc 1980). This Court in *Lute, citing State ex rel. Peach v.*

Bloom, 576 S.W.2d 744, 747 (Mo. banc 1979), stated, " . . . the 'provisions of law existing prior to the new criminal code [are] applicable to all offenses committed prior to January 1, 1979.' " Here the trial court, consistent with the *Lute* rule[,] applied the statutes and employed the instructions prescribed for use in criminal cases effective at the time of the murder. Appellant, however, complains that because the trial occurred after January 1, 1979, the effective date of the new Criminal Code, the new accessory statute, § 562.041[,] and the corresponding approved instruction for that section, *i.e.*, MAI-CR2d 2.12, should have been submitted. This contention is not well taken[,] and it would have been error to have done as appellant now urges. *See, State v. Lute, supra.*

Appellant contends Instruction No. 9 fails to apprise the jury of the elements of capital murder found in § 565.001, RSMo 1978. That section defines capital murder as "Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills, or causes the killing of another human being is guilty of the offense of capital murder." While Instruction No. 9 [MAI-CR2d 15.02, MAI-CR 2.12] does not utilize the precise statutory words, it nevertheless employs terms which have been determined as proper substitutes by our courts. Indeed the terms utilized in Instruction No. 9 are preferable for instructional purposes in that they more clearly set forth the mental state and other aspects of the crime necessary for conviction of capital murder. In particular, appellant complains the term "unlawfully" is not employed in Instruction No. 9. This contention misses the point and is without merit. The question of whether the homicide is lawful or unlawful is[,] in the first instance[,] a question

of law to be decided by the court at the close of the evidence[,] when determining whether a submissible case has been made. At that point there was not a scintilla of evidence suggesting the killing was "lawful" or justifiable [which would have required modifying 15.02 (No. 9) by one of the forms set forth at 2.40 *et seq.*] or excusable [which would have required modifying 15.02 by 2.28]. Hence, there is no requirement that the term "unlawfully" or an equivalent be employed in this instance.

The statutory elements "willfully" and "knowingly" are adequately reflected in the second and third paragraphs of Instruction No. 9 which require a finding that defendant intended to take the life and knew he was practically certain to cause death. *State v. Thomas*, 595 S.W.2d 325, 328 (Mo. App.1980).

The element "deliberately" is appropriately set forth in the fourth paragraph of Instruction No. 9 which mandates that defendant coolly and fully reflected on this act. *See, State v. Turner*, 623 S.W.2d 4, 7 (Mo. banc 1981); *State v. Strickland*, 609 S.W.2d 392, 394 (Mo. banc 1980). The element of premeditation is defined in Missouri as thought beforehand for any length of time however short. *State v. Turner, supra* at 7. The equivalent term "considered" in No. 9 supplies the requirement of premeditation prescribed in the statute. Accordingly, we hold that Instruction No. 9 correctly requires the finding of the statutory elements of capital murder.

Appellant next contends the instructions given were fatally defective in that they did not require a finding of premeditation *in appellant*, and complains of the phrase "defendant or another" used in each paragraph in

Instruction No. 9. This phrase is specifically provided by Instruction MAI-CR 2.12 and Notes on Use when there is evidence of accessory liability, and the mode of melding 2.12 in the structure of 15.02, utilized here, is in the form prescribed. An instruction thus in the format of MAI-CR will not be deemed error. *State v. Easton*, 577 S.W.2d 953, 958 (Mo.App.1979), *cert. denied*, 444 U.S. 863, 100 S.Ct. 131, 62 L.Ed.2d 85; *State v. Champion*, 560 S.W.2d 903, 905-06 (Mo.App.1978). Further, according to Missouri law, premeditation may be found in another and imputed to defendant as contemplated by the language of instruction No. 9. That language[,] when read with the general Instructions No. 5 and No. 8, requires that appellant manifest the requisite intent for perpetration of the offense. It suffices if defendant "knowingly acted in concert with another for the common purpose of committing the offense, or knowingly and intentionally aided or encouraged the other in committing the offense." *State v. Turner*, 623 S.W.2d 4, 8 (Mo. banc 1981); *State v. Strickland*, 609 S.W.2d 392, 395 (Mo. banc 1980).[3]

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[3] Appellant attempts to bolster his contention by arguing the evidence showed no premeditation; hence, had the jury been instructed that premeditation personal to appellant was necessary, he would have been acquitted. This is an argument that the evidence was insufficient to sustain appellant's conviction, rather than a claim of instructional error. Further, we note the evidence, as set forth above, was sufficient to sustain appellant's capital murder conviction, whether he acted alone or as an accessory. Appellant would also lend credence to his claims of instructional error by alleging that the prosecutor even argued to the jury that appellant need not personally have premeditated. Such allegation, however, is pertinent only to a contention of improper argument, not instructional error.

Appellant next urges that for a conviction under § 565.001, RSMo 1978, the accused must be found to have premeditated, and the instructions fail in this regard. Missouri has abolished the distinctions between principals in the first degree and accessories. *State v. Lute*, 608 S.W.2d 381, 383-84 (Mo. banc 1980); *State v. Easton*, 577 S.W.2d 953, 957 (Mo.App.1979), *cert. denied*, 444 U.S. 863, 100 S.Ct. 131, 62 L.Ed.2d 85. Under § 556.170, RSMo 1969, effective at the time of the murder in question, one may be liable as a principal by aiding and abetting another. MAI-CR 2.10 (Instruction No. 5) and 2.12 (Instruction No. 9) reflect this tenet by imposing guilt on one found to be an accessory to the same degree that guilt is imposed upon a principal.[4] Contrary to appellant's assertions, Instructions No. 9 and No. 5 did not permit the jury to find appellant guilty of capital murder solely on the basis that "another" possessed the necessary mental state for capital murder. These instructions correctly required that appellant be found (1) to have manifested the requisite intent and did the killing or (2) that he knowingly and with a common purpose aided one who killed with the requisite intent for capital murder. *See, State v. Turner*, 623 S.W.2d 4, 8 (Mo. banc 1981); *State v. Grebe*, 461 S.W.2d 265 (Mo.1970).

Paragraph "Fifth" of Instruction No. 9 contains the essence of this proposition which is amplified and made abundantly clear by the provisions of the first paragraph of Instruction No. 5 and Instruction No. 8. We find no error, *a fortiori* no plain error, in the given instructions.

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[4] These instructions also virtually parallel current accessory liability statutes, § 562.041, RSMo 1978.

III.

It is next asserted that in excusing three prospective jurors[,] the trial court violated the standards of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). There it was held error to excuse veniremen voicing general objections to the death penalty. In its reiteration of the *Witherspoon* rule[,] the Court in *Davis v. Georgia*, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339, 341 (1976), stated: "Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings[,]' . . . he cannot be excluded. . . ." Here the three excused fall into the class properly excluded. Venirewoman Daily was asked by the prosecutor: "[I]f after you were selected as a juror in this case, and you heard all of the evidence and deliberated and found the defendant guilty of capital murder. . . . [the concluding phrase was restated after objection by the defense] can you consider both sentences in arriving at your verdict – which [alternatives] are the death penalty and the life imprisonment without parole for fifty years?" Mrs. Daily answered "no". Venirewoman Lang responded negatively to a very similar question propounded by the trial judge. Venirewoman Marshall was asked by the defense, in a question addressed to all the remaining venire persons, "[I]s there anyone that[,] should Mr. Newlon be convicted of capital murder[,] . . . who couldn't consider, . . . the penalty of imprisonment as well as the death penalty?" She replied, "I would not consider the death penalty." The response of each was unambiguous and unmistakably clear. The administration of justice requires jurors

who will follow and not ignore the law. *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *State v. Mercer*, 618 S.W.2d 1, 6-7, (Mo. banc 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 432, 70 L.Ed.2d 240. Appellant's claim of error is without merit.

IV.

Appellant would fault the trial court for what he contends is plain error[5] in failing to *sua sponte* declare a mistrial following remarks of the prosecutor in argument during the *punishment phase* of trial.[6] When measuring this contention[,] several familiar principles bear reprise. Broad discretion rests with the trial court in the control of closing argument, with wide latitute accorded counsel in their summations. *State v. Wood*, 596 S.W.2d 394, 403 (Mo. banc 1980), *cert. denied*, 449 U.S. 876, 101 S.Ct. 221, 66 L.Ed.2d 98; *State v. Lansford*, 594 S.W.2d 617, 622 (Mo. banc 1980); *State v. Murphy*, 592 S.W.2d 727, 732-33 (Mo. banc 1979). A conviction will be reversed for improper argument only if it is established the complained[-]of comments had a decisive effect on the jury's determination. *Murphy, id.* Indeed, relief should be rarely granted on assertions of *plain error* as to closing argument, for where no objection was lodged, trial strategy is an important consideration[,] and such assertions are generally

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[5] Review can be had only under the plain error rule because of appellant's want of objection to any of the contested remarks.

[6] Appellant stood convicted of capital murder. No question of guilt remained. The jury was called then to consider matters in aggravation and mitigation. The record of his life, his prior crimes, [and] the heinous character of the murder as it bore on the issue of depravity were proper for consideration.

denied without explication. *State v. Bryant*, 548 S.W.2d 209, 211 (Mo. App. 1977). Thus because the absence of objection, request for admonishment to disregard, or for other relief narrows the trial court's options, requiring uninvited interference with summation and a corresponding increase of the risk of error by such intervention.

Nevertheless, appellant maintains the trial court abused its discretion by not voluntarily interrupting comments of the prosecutor's [sic] during argument, grouped here in three categories.

First, appellant alleges the prosecutor[,] by these comments[,] sought to enlarge the crime by appearing to have special knowledge outside the record.[7]

> *Now, when I said[,] initially, that this was a difficult thing for me – I've been a prosecutor for ten years and I've never asked a jury for a death penalty, but I can tell you in all candor, I've never seen a man who deserved it more than Rayfield Newlon.* By returning your verdict in this case, – and you people found him guilty of capital murder – that either means that you believe beyond a reasonable doubt that he pulled the trigger, or that he had the frame of mind that's consistent with pulling the trigger, and I submit to you, [sic] that Rayfield Newlon did pull the trigger, and didn't pull it once, but pulled it twice – executed an innocent man in cold blood.
>
> So where do you go from there? *I say to you that I never saw a man who deserved it more[,] and I say that to you in complete sincerity, and it's my job, as I see it, to tell you that.*

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[7] Italicized portions of the quoted arguments are the phrases to which appellant *now* objects.

It is asserted these statements breach the rule that a prosecutor may not express an opinion implying awareness of facts not available to the jury. *State v. Moore*, 428 S.W.2d 563, 565 (Mo.1968); *State v. Hart*, 292 Mo. 74, 237 S.W. 473, 480-81 (1922). However, balanced against this rule is the proposition, [sic] that the prosecutor may state his conclusion if it is fairly drawn from the evidence, and his inferences need not seem necessarily warranted. *State v. Jackson*, 499 S.W.2d 467, 471 (Mo. 1973); *State v. Jones*, 491 S.W.2d 271, 273 (Mo. 1973); *State v. Moore, supra; State v. Hart, supra, State v. Haynes*, 528 S.W.2d 11, 13 (Mo. App.1975). Further, prosecutorial comment referring to facts not before the jury may be permissible, [sic] so long as it does not imply special knowledge of evidence pointing to defendant's guilt, *State v. Moore*, supra; *see, State v. McKinney*, 475 S.W.2d 51, 55 (Mo. 1971); *State v. Coleman*, 524 S.W.2d 27, 33 (Mo. App. 1975), and[,] indeed[,] the prosecutor may indicate a belief of guilt drawn directly from the State's evidence. *State v. Jackson, supra* at 471. Here the question of guilt had been settled. Only questions of aggravation and mitigation going to the issue of punishment remained. The jury had been confronted with substantial evidence pointing to the callous nature of the crime and [to the] depravity of the murderer. The record demonstrated a cold-blooded execution of an innocent man[,] deserving of better, to avoid identification and/or for the pleasure of killing, linked with a total lack of remorse for the crime or sympathy for the victim. The statements of the prosecutor were directed to the allegation of depravity, a condition which could arguably be inferred from the evidence. A similar remark, "If ever I heard a better case made of burglary second . . . ," was

deemed permissible in *Haynes, Id.* at 13. We find no abuse of discretion by the trial court, and necessarily no manifest injustice in not *sua sponte* declaring a mistrial because of such statements.

The second group of comments now challenged, included the following:

> *I submit to you that he deserves to die. He doesn't deserve to breathe the same air that Mrs. Dave breathes. She's a widow with a son, and he's a son with no father. He doesn't deserve to breathe the same air.*
>
> * * *
>
> Before you can take Rayfield Newlons' [sic] life, you have to give him a lawyer and a fair trial – he's entitled to that, and he got an excellent lawyer and a fair trial and twelve fair citizens. *Now if you say he deserves the death penalty, under the law, Judge Ruddy must review it[,] and if he agrees, then his decision is reviewed by the Supreme Court* – which is only appropriate and fair under the circumstances. But, [sic] did Mansfield Dave have his day in Court? If Rayfield Newlon is killed[,] he'll know his appointed hour and have an opportunity to get his soul straightened out, and in a condition to meet his Maker. I'm not saying this lightly, or for dramatic effects – not at all. How do we know if *Mr. Dave was prepared to meet his Maker, or what condition his soul was in before he was blown away. Do you think he gives a damn?* He didn't care . . . .
>
> * * *
>
> *I'm telling you, [sic] that Rayfield Newlon deserves to die, not only for what he did, but I think it's absolutely critical to say to him and others like him, . . . that you have got to stop killing.* You've got to stop robbing, and if you do this in St. Louis County[,] you're going to pay the price. You people have got the opportunity here to

sent out this message, and to send it out all over St. Louis County – you're [sic] own community – and Kinlock is a part of your community – this could have happened in Ladue, Lemay, Florissant, or Ferguson – these kinds of crimes happen every day and go on happening, and you've got the opportunity to say that Rayfield Newlon's in this area, if you're going to do your killing and keep on doing it – don't do it in our community, because it you do, we're going to kill you because we['ve] got the right to do it; it's fair and appropriate and it's right – not cruel and not unusual punishment – it's right. Did Mr. Newlon show any remorse in the videotape? No. Did he show any remorse on the witness stand? No. Did he show any reaction or emotion when the verdict was returned last night? You look at him? No. *He knew what was coming; he knew that what he did would send him to prison – that's no big deal – he's been there before, and what assurances do you have that he'll be there fifty years? The legislature could change the law. All it says is no parole. It doesn't say it can't be commuted. There's no assurance of that at all. The law could be changed, but at least with death there is some assurance he won't commit any more crimes[,] and the message is loud and clear, and perhaps others will think twice before they commit a robbery and take a life just for money. What I'm saying to you is if you come back with a life sentence without him [sic] being eligible for parole for fifty years – that that won't get any reaction, and that's what he's expecting you to come back with – that's no big deal, going to prison, but maybe you'll get his attention if you come back with . . . "we sentence you to death."*

* * *

. . . the law gives you two alternatives. But, if somebody is guilty of capital murder[,] the ultimate crime, why should they get anything other than death?

* * *

You know – when I talk about sending out a message – well, I know the Charles Mansons wouldn't hear the message, or the Richard Specks or the "[S]ons of Sam" – those kinds of people wouldn't hear it because those people are insane – legally responsible [sic] for what they did, but they wouldn't get this kind of message, and in the same – a truer fashion, he's not insane. This was simply a business venture – you know, he didn't hear any strange voices speaking to him, he just wanted some money, and all that stood between him and the money, [sic] was Mansfield Dave, and he eliminated – executed him.

* * * *

If Rayfield was [sic] going to harm your child, would you kill him? Would you have prevented this killing if you'd been in the conveniency store with a gun, and you could have saved Mr. Dave's life? Would you have killed Rayfield? I think you would have – at least, I hope you would have had the courage to do either one of those. If you think you would have, kill him now. Kill him now. Once again, I hope you have the courage to do that, because it's tough.

I really don't have much more to say, but I hope to impress upon you that *this is truly a war – I mean, a "street war[,]" and it's justifiable to kill in a war. You know there are enemies – there's no question about it, Rayfield and others like him are the enemy[,] and it's still going to go on, and on, and on, unless you citizens of St. Louis County say it's not going to go on, and we may have to catch you and convict you, but when we do, we're going to execute you, and at least those people won't go and do it.*

Appellant maintains the court erred in failing to *sua sponte* prevent [sic] these remarks or to declare a mistrial because they improperly personalized the crime, causing

the jury to fear appellant, [that the prosecutor] applied personal epithets to appellant, and [that he] argued for the death penalty based on an anticipation of appellant's future conduct. The record[,] however, warrants conclusions other than those urged by appellant. *See, State v. Hoskins*, 569 S.W.2d 235, 236 (Mo.App.1978); *State v. Coleman*, 524 S.W.2d 27, 32 (Mo.App.1975). A review of the prosecutor's entire argument reveals a clear intent to impress upon the jury the serious nature of the murder as part of a permissible plea for strict law enforcement. We must not lose sight of the problem then before the court and jury. The prosecutor was seeking the death penalty which[,] in his view[,] was justified from the evidence[,] and through analogy[, the prosecutor] sought to demonstrate the aptness of the penalty as a deterrent. In this setting a prosecutor may urge imposition of a severe sentence as a signal to deter future crimes in a community. *State v. Wright*, 515 S.W.2d 421, 432 (Mo. banc 1974); *State v. Laster*, 365 No. 1076, 293 S.W.2d 300, 306 (Mo. banc 1956), *cert. denied*, 352 U.S. 936, 77 S.Ct. 237, 1 L.Ed.2d 167; *State v. Cole*, 588 S.W.2d 94, 100 (Mo.App.1979); *State v. Bryant*, 548 S.W.2d 209, 212 (Mo.App.1977). Further, under evidence in this record[,] it was not improper for the prosecutor to refer to the prevalence of crime as a "street war[,]" as it appears from the evidence or as a matter of common knowledge, *State v. Hart*, 292 Mo. 74, 237 S.W. 473, 481 (Mo. 1922), and to argue that it would be a reflection upon them to fail to convict under the evidence presented. The prosecutor's reference to the victim's family was a legitimate comparison of defendant to the victim, demonstrative of the inutile nature of the slaying and that the senseless cruelty

of this act revealed a depravity justifying the death penalty as a deterrent to such acts. *See, State v. Jackson*, 499 S.W.2d 467, 471 (Mo.1973); *State v. Swenson*, 551 S.W.2d 917, 920 (Mo.App.1977). Appellant's assertion that the prosecutor categorized him with certain notorious killers misconstrues the argument in this regard. *See, State v. Hoskins*, 569 S.W.2d 235, 236 (Mo.App.1978); *State v. Coleman*, 524 S.W.2d 27, 32 (Mo.App.1975). Taking the remark in context, it appears the prosecutor was urging that imposition of the death penalty in a case such as this would serve as a better deterrent than it would to one of the insane mass murderers mentioned. The other remarks argued as having permissibly personalized the crime, or caused the jury to fear appellant and urged death to prevent future crime by appellant, were coupled with comments generalizing the deterrent effect to others of a strict sentence in this case. The thrust of the contested statements was a plea for stricter law enforcement as a deterrent to crime. *State v. Swenson*, 551 S.W.2d 917, 920 (Mo.App.1977). It has long been recognized that the prosecutor is permitted to argue such propositions as the prevalence of crime in the community, the personal safety of its inhabitants, and the jury's duty to uphold the law[,] as well as inferences from its failure to convict, and such pleas may call upon common experience. *State v. Rodriguez*, 484 S.W.2d 203, 207 (Mo.1972); *State v. Jackson*, 447 S.W.2d 47, 53 (Mo.1972); *State v. McKinney*, 475 S.W.2d 51, 55 (Mo.1971); *State v. Burnett*, 429 S.W.2d 239, 246 (Mo.1968); and *State v. Brauch*, 529 S.W.2d 926, 931 (Mo.App.1975).

Appellant's final challenge centers on the following comment:

> Did Mr. Newlon show any remorse in the videotape? No. Did he show any remorse on the witness stand? No. Did he show any reaction or emotion when the verdict was returned last night? You look at him? No. *He knew what was coming; he knew that what he did would send him to prison – that's no big deal – he's been there before, and what assurances do you have that he'll be there fifty years? The legislature could change the law. All it says is no parole. It doesn't say it can't be commuted. There's no assurance of that at all. The law could be changed, but at least with death there is some assurance he won't commit any more crimes[,] and the message is loud and clear, and perhaps others will think twice before they commit a robbery and take a life just for money. What I'm saying to you is if you come back with a life sentence without him [sic] being eligible for parole for fifty years – that that won't get any reaction, and that's what he's expecting you to come back with – that's no big deal, going to prison, but maybe you'll get his attention if you come back with . . . "we sentence you to death."*

He relies on *State v. Mobley*, 369 S.W.2d 576, 580-81 (Mo.1963), for the proposition that the State may not argue a defendant's criminal record as a reflection of his character and a basis for conviction, nor to prevent future criminal acts by him. *Mobley*, however, is inapposite. The argument there was in a unitary proceeding for determination of guilt on a burglary charge. Here testimony of appellant's prior criminal convictions had entered the case as impeaching evidence during his testimony in the guilt phase. Such evidence was available for consideration during the presentence (punishment phase) hearing (§ 565.006.2) and was relevant to the issue of depravity, revealing in part appellant's background to better assess

the crime, the then[-]convicted criminal and the appropriate punishment. It was a permissible subject for argument. The contention is denied.[8]

V.

It is next contended that the trial court erred in refusing to allow testimony of a defense witness to impeach William West's reputation. A single question

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[8] The arguments directed to the jury's emotions were not peculiar to the prosecution. The defense[,] too[,] made a strong appeal to the sentiment as well as the minds of the jury, including the following:

> If you look around the Courtroom, Rayfield hasn't had any family here at all – this week, he hasn't had any friends here. It's been just me and Rayfield.
>
> * * *
>
> I don't see how you can kill him. Rayfield is twenty-four years old.
>
> Now, the alternatives are, of course, fifty years in prison without parole, or the death of Rayfield. If you should let him live, he would be seventy-four-years-old when he got [sic] out of prison, and even though Mr. Westfall made reference to watching T.V., and going to the recreation rooms and things like that, – you get up in the morning and there are four gray walls with bars at the end of the room. People in prison are not people to associate with. People in prison get killed – it's a daily routine.
>
> You know, I like to fish. If I were in prison, I wouldn't see a lake or a stream – it's total restriction [–] for fifty years. Total restriction.
>
> If you decide to kill him, they'll take him to the penitentiary and put him in a chair and strap him in, and pull a switch – his eyes will roll back in his head and his heart will stop and life will end.

was posed to defense witness Parker: "Does he [West] have a reputation in Kinlock for truth and veracity?" Objection was sustained[,] and no offer of proof nor further inquiry followed. This allegation of error, not included in appellant's motion for new trial, will be examined for plain error under Rule 29.15. While testimonial evidence may be introduced to impeach a witness's reputation for truth and veracity in the community, *State v. Woods*, 428 S.W.2d 521, 523 (Mo.1968); *State v. Cross*, 343 S.W.2d 20, 23 (Mo.1961), the trial court has wide discretion as to the admission of such evidence. *State v. Miles*, 253 Mo. 427, 161 S.W. 766, 769 (Mo.1913). West's credibility had been repeatedly attacked throughout cross-examination during which prior felony convictions, as well as the voluminous record of his prior inconsistent statements, were brought to the jury's attention. West admitted[,] and it was stipulated[,] he had been convicted of burglary second degree and stealing, as well as flourishing (a deadly weapon), for which he received concurrent three[-]year sentences. These sentences were imposed only two days before he had been allowed to plead guilty to murder in the second degree for his part in the Mansfield Dave killing. Though he had not been sentenced, the State had agreed to recommend ten years. This told the jury West had been convicted of crimes involving dishonesty (burglary and stealing) and crimes of violence (the murder of Mr. Dave), and had a profound interest (the plea bargain for second degree murder) motivating his testimony favorable to the State. Evidence of this "deal" in return for his testimony was before the jury. Clearly, additional evidence as to his general reputation could have been of marginal value as

impeachment.[9] Additionally, it is difficult to fault the court when[,] at the time in question[,] it requested that defense counsel provide some "authority" for allowing an answer to the question. While it is not required that such authority be supplied, counsel made neither offer of proof nor suggestion to assist the court. No relief was requested. Indeed the matter was pursued no further during trial nor raised in the motion for new trial. It cannot be said the trial court is guilty of reversible error[,] much less manifest injustice.

VI.

This Court reviews the sentence in capital murder cases when the death penalty is imposed § 565.014.1, and determines whether the sentence was assessed under the influence of passion, prejudice or any other arbitrary factor, § 565.014.3(1), and whether the evidence supports the jury's finding of statutory aggravating circumstances enumerated in § 565.012. § 565.014.3(2). Here the record reveals that the death sentence fixed by the jury and imposed by the court was not the result of passion, prejudice or any arbitrary factor. At the first phase of the bifurcated proceeding mandated by § 565.006, the jury returned a verdict finding appellant guilty of capital

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[9] In a somewhat analogous situation of a motion for a new trial because of newly discovered evidence, testimony merely for impeachment of a witness'[s] credibility carries little weight, and a new trial for such testimony will be refused. *State v. Taylor*, 589 S.W.2d 302, 305 (Mo.1979); *State v. Brown*, 360 S.W.2d 618, 622 (Mo.1962); *State v. Wynn*, 357 S.W.2d 936, 940 (Mo.1962); *State v. Rutledge*, 317 S.W.2d 365, 367 (Mo.1958).

murder. In the presentence hearing that followed, neither party presented additional evidence[,] but both argued extensively the issue of punishment. The jury was instructed on two aggravating circumstance: (1) whether the defendant murdered Mansfield Dave for the purpose of receiving money or any other thing of monetary value, § 565.012.2(4); (2) whether the murder of Mansfield Dave involved depravity of mind[,] and that as a result thereof[,] it was outrageously or wantonly horrible or inhuman, § 565.012.2(7). The court also instructed the jury on these mitigating circumstances: (1) whether the defendant was an accomplice in the murder of Mansfield Dave and whether his participation was relatively minor, § 565.012.3(4); (2) whether defendant acted under extreme duress or substantial domination of another person, § 565.012.3(5); (3) the age of the defendant at the time of the offense, § 565.012.3(7). The jury found beyond a reasonable doubt the existence of the second submitted aggravating circumstance[,] and the evidence supports the jury's findings.

Appellant contends that § 565.012.2(7) is facially unconstitutional by reason of its vagueness and is violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Art. I, § 10 of the Missouri Constitution. Specifically, appellant argues the phrase "depravity of mind" is impermissibly vague. However, the language of the statute and its correlative instruction are the same in all essentials to that of the seventh aggravating circumstance of the Georgia death statute. Georgia Code Annotated § 27-2534.1(b)(7). The United States has on at least two occasions examined the

Georgia death penalty statute and its aggravating circumstance No. 7 and concluded the statute is facially valid. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). As noted above, one who attacks the constitutionality of a statute bears a heavy burden [– a burden] which appellant has not carried. Appellant notes that during their deliberations the jury requested a definition of the phrase "depravity of mind" and [that] this request was denied by the court. He argues this demonstrates the facial invalidity. As with any attempt to label a mental state (e.g., intent, deliberation, reasonable doubt)[,] there can be no precise objective definition for its terms. So it is with the phrase "depravity of mind". While appellant would quarrel with the lack of further definition of terms, such does not prohibit the legislature from enacting criminal penalties graduated according to an offender's mental state. Hence, when the statute employs such words of common speech, it is the responsibility of the jury to determine if the offender acted in a manner denoting depravity of mind. In addition to the previously mentioned safeguards providing the due process found in the mandatory review provisions, § 565.014, we must review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases[,] considering both the crime and the appellant, which eliminates as nearly as possible capricious imposition of the death penalty. We find § 565.012.2(7), RSMo 1978, facially valid under the Missouri Constitution.

Citing *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), appellant next contends the evidence was insufficient to support a conclusion that his

conduct in committing "the murder of Mansfield Dave involved depravity of mind and that[,] as a result thereof[,] it was outrageously or wantonly horrible or inhuman." *Godfrey*, however, rests on its unique facts. There, it was conceded defendant had not tortured the victims nor committed an aggravated battery upon them. Yet, the death sentence rested on the jury's finding that Godfrey's actions had been "outrageously or wantonly vile, horrible or inhuman in that [they] involved- . . . depravity of mind. . . ." The Court rejected such conclusion as unconstitutional, noting several facts: Godfrey's victims were family members who had caused him "extreme emotional trauma"; that in an emotional state, he had killed them instantaneously; [that] shortly after the killing Godfrey acknowledged [his] involvement and the heinous nature of his crime and[,] further, Godfrey had no criminal record. On these facts Godfrey's actions were deemed not to reflect "a consciousness materially more 'depraved' than that of any other person guilty of murder."

In the case *sub judice*[,] the State established that Newlon's conduct was outrageously or wantonly vile, horrible and inhuman. Newlon planned the robbery[,] making elaborate preparations for the scheme. He enlisted the help of a willing accomplice, West[,] and later a second accomplice, Williams. He also provided a 16-gauge shotgun, and sawed portions from the barrel and stock to facilitate its concealment and [to] provide an especially dangerous short-range weapon. He test-fired the gun and selected for robbery a nearby convenience store[,] where he knew its operators. Before entering the store[,] Williams, one of the conspirators, announced he would probably have to kill Mr. Dave as Mr. Dave knew

him. Hence, Newlon and Williams entered the store with the very real probability of murder in mind. They waited until all possible witnesses had left the store except the intended victim, Mansfield Dave. When they entered, Franz Williams, serving as a decoy, went to the soda case at the rear[,] and Newlon approached Mr. Dave. When Mansfield Dave's back was turned, Newlon drew and hand-cocked the gun, and when Mansfield Dave faced around, Newlon, without warning or provocation, shot him in the torso with the sawed off shotgun. Though the victim was knocked to the floor, Newlon cold-bloodedly broke open the single-action shotgun, extracted the spent shell, inserted a fresh shell, closed the gun, reclosed and recocked the gun, and leaning over the counter where the victim had fallen, shot Mansfield Dave again as he lay bleeding on the floor. Once more, Newlon opened the gun and extracted the second shell, apparently to insert a third shell, however, the alarm sounded, causing him to run from the store. The second extraction indicated Mansfield Dave might have suffered a third blast from the shotgun, [sic] but for the alarm, for why else would Newlon have broken open the gun a second time and extracted the second shell except in preparation for a third shot. This was a senseless killing, a killing for killing's sake. Appellant argues there was no torture involved[,] and thus a reversal of the death sentence is required under *Godfrey, supra*. However, it should be pointed out that if Mr. Dave was [sic] dead after the initial shot, the second blast, deliberately performed in the manner described, would have served to mutilate the corpse, a macabre purpose demonstrating depravity. If, on the other hand, Mansfield Dave was [sic] still alive, the second shot was to insure [sic] the killing, and the

first blast from this sawed off shotgun must have inflicted extreme suffering. The record supports the finding of depravity. *See Turner v. Commonwealth of Virginia*, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981). There the murderer[,] Willie Lloyd Turner[,] entered a jewelry store with intent to rob. He "displayed a sawed-off shotgun previously concealed . . . and demanded money and jewelry." *Id.* 273 S.E.2d at 39. While the proprietor and an employee complied with the robbery demand by placing money and jewelry in a bag, a silent alarm was sounded[,] alerting the police department. Two other parties entered the store not knowing a robbery was in progress. They[,] too[,] were detained by Turner. Discovering that Smith, the victim, had activated the alarm, Turner demanded it be turned off[,] and Smith complied. Learning that one of the newcomers in the store, Alan Bain, was a policeman, Turner stated that if he saw or heard any additional police, he was going to start killing those in the store. About that time, hearing a siren, Turner, without warning, shot Smith in the head with a revolver taken from Brain. Apparently angered or aggravated by the triggering of the silent alarm and the arrival of the police, Turner leaned over the counter and in rapid succession fired two more rounds into Smith's chest. Turner, like appellant here, had a record of prior felony convictions. The jury found his acts outrageously or wantonly vile, horrible or inhuman and that the conduct resulted from the perpetrator's depravity of mind, justifying imposition of the death penalty. The Supreme Court of Virginia affirmed. The facts in *Turner* are strikingly similar to those before us. Indeed, the killing in *Turner* was possibly

more understandable because of the emotion or sense of aggravation generated by the alarm and the siren heralding the arrival of the police. The pertinent portions of the Virginia statutes are similar in all essentials to ours[,] and the decision in *Turner* provides persuasive precedent here.

The contentions of legal error have been denied for the reasons heretofore enumerated in this opinion. The evidence from the record substantiates the verdict. Section 565.014.7. In this capital murder case, the second decided on appeal in which the death penalty has been imposed under the current capital murder statute, we have[,] under § 565.014.5[,] considered these similar cases in which both death and life imprisonment were submitted to the jury, and which have been affirmed on appeal: *State v. Mitchell*, 611 S.W.2d 223 (Mo. banc 1981); *State v. Williams*, 611 S.W.2d 26 (Mo. banc 1981); *State v. Royal*, 610 S.W.2d 946 (Mo. banc 1981); *State v. Borden*, 605 S.W.2d 88 (Mo. banc 1980); *State v. Downs*, 593 S.W.2d 535 (Mo.1980); *State v. Turner*, 623 S.W.2d 4 (Mo. banc 1981); and *State v. Mercer*, 618 S.W.2d 1 (Mo. banc 1981), *cert. denied*. ___ U.S. ___, 102 S.Ct. 432, 70 L.Ed.2d 240. The evidence of Newlon's acts demonstrated a level of culpability and depraved quality supporting the jury's verdict. The cases mentioned support the affirmance of the death penalty in the case at bar. The sentence of death for the murder of Mansfield Dave is neither excessive nor disproportionate to the penalty imposed in similar cases considering the crime and the appellant.

Judgment affirmed.

Date of execution set for March 26, 1982.

DONNELLY, C. J., and WELLIVER, MORGAN and HIGGINS, JJ., concur.

SEILER, J., concurs in part and dissents in part in separate opinion filed.

BARDGETT, J., concurs in separate opinion[,] concurring in part and dissenting in part of SEILER, J.

SEILER, Judge, concurring in part and dissenting in part.

I concur in result as to affirmance of the conviction for capital murder, but respectfully dissent as to the affirmance of the death penalty, for the reasons set forth below.

I

Defendant was found guilty by a jury of capital murder and sentenced to death. When the death penalty is imposed, this court has a three-fold duty: 1) we must review the guilt or innocence stage of the bifurcated trial for error; 2) we must review the sentencing stage of the trial for error; and 3) we must review independently the appropriateness of the death penalty for this particular defendant and for this particular crime. In performing the first two duties, this court acts as an appellate court, *i.e.*, it reviews the record for assignments of error. The third duty, however, is an affirmative one, which is set out in

§ 565.014.3, RSMo 1978.[1] This third duty requires us to examine the whole record to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 565.012; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

This review is essential because, once the sentence is executed, there is no opportunity to correct it. Because I conclude that the sentence of death in this case is "excessive or disproportionate to the penalty imposed in similar cases," and that the sentence "was imposed under the influence of" passion, prejudice and other arbitrary factors, either of which is sufficient to require reversal of the death penalty, I would affirm the conviction for capital murder and reverse and remand the cause for resentencing. Section 565.014.5(2).

II

The United States Supreme Court[,] in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), found the challenged death penalty statutes violated the Eighth Amendment's guarantee against cruel and

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[1] All statutory references are to RSMo 1978 unless indicated otherwise.

unusual punishment because the statutes were applied in a discriminatory and arbitrary manner. *Id.* at 249, 92 S.Ct. at 2731 (Douglas, J., concurring). Justice Steward in *Furman* stated that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.* at 309-10, 92 S.Ct. at 2762 (Stewart, J., concurring). In response to *Furman*, Missouri, along with many other jurisdictions, adopted new legislation to insure [sic] that the jury would be given proper direction so that the death penalty would not be imposed in an arbitrary and capricious manner. *State v. Royal*, 610, S.W.2d 946, 950 (Mo. banc 1981). Under our statutes, a defendant charged with capital murder is tried in a bifurcated trial. Section 565.006.1, RSMo Supp.1981. The first stage involves determination of guilt; the second stage involves determination of punishment. To impose death as the punishment, the trier of fact must find beyond a reasonable doubt one of twelve statutory aggravating circumstances. Section 565.012.2, RSMo 1978 and Supp.1981 (the 1978 version, applicable to this case, lists only ten aggravating circumstances).

The jury found defendant Newlon guilty of the capital murder of Mansfield Dave. It is true that the jury *could* have found the facts as set forth on page 3 of the principal opinions as to defendant['s] and Franz Williams['] entering the store together, with defendant['s] wielding the shotgun and doing the shooting, but it is incorrect to leave the impression that the verdict of guilty means that

the jury found the facts as above. On the contrary, as will be developed below, the jury could have found that the defendant, *instead of being the principal,* was an *accomplice* of Franz Williams, and that Williams did the shooting while defendant was at the back of the store getting a soda to divert the victim's attention. Because the verdict-directing instruction required only that the jury find *either* "the defendant or another" killed Mr. Dave, there is no way to determine which of the two versions the jury found as the fact. Indeed, the principal opinion points out that instruction no. 9 submitted appellant's guilt of capital murder "as an accessory" and that the instruction requires *either* that 1) defendant did the killing, or 2) aided one who did.[2]

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[2] Instruction no. 9 was as follows:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about April 24, 1978, in the County of St. Louis, State of Missouri, the defendant or another caused the death of Mansfield Dave by shooting him, and

Second, that the defendant or another intended to take the life of Mansfield Dave, and

Third, that the defendant or another knew that they were practically certain to cause the death of Mansfield Dave, and

Fourth, that the defendant or another considered taking the life of Mansfield Dave and reflected upon this matter coolly and fully before doing so, and

Fifth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs, then you will find the defendant guilty of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

To return to the facts: The prosecutor was faced with a problem, [sic] because his only eyewitness supporting the theory that defendant fired the shots was Walter West and there were formidable credibility problems with the jury as to West. West, who had five prior convictions according to the prosecutor, was also in on the plot to rob and kill Mr. Dave and served as lookout and driver of the getaway car. He made a deal with the state whereby he was permitted to plead guilty to second degree murder and received a sentence of only ten years, which was to be served outside the state.[3]

West testified he was in an automobile, [sic] parked across the street, some forty-five yards from the store front (actual measurement 157 feet). It was dark, 10:30 p.m., and the store level was five feet below the parking lot level, down two short flights of steps. The photographs which were put in evidence by the state, Exhibits 1, 2, 3 and 14, purporting to show the general area and the location of the store, would raise a question by any viewer as to whether West was in a position to see all that he testified to, although, of course, this was a question for the jury. The prosecutor[,] many times in his jury argument[,] sought to bolster West's credibility. He insisted that the physical evidence did not disprove West's testimony[,] and he undertook to explain away the discrepancies between West's deposition and his trial testimony. He repeatedly urged the jury not to disregard West's testimony.

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[3] The prosecutor in closing argument said, "Walter West got a deal – and quite frankly something I apologize to you for. It's one of the regrets I have. Walter West got far too good of a deal, and it's unfortunate that he'll get off with ten years. . . ."

Defense counsel, as would be expected, strongly attacked West's credibility and argued the physical facts belied West's testimony as to what he claimed to see [sic] from across the street.

The principal opinion devotes an entire page to the attacks made on West's credibility.

However, the prosecutor wanted to be sure that the jury knew that they could convict defendant of capital murder even if they did not believe the witness West and did not believe that Newlon personally killed Mr. Dave. To that end, the state introduced defendant's videotaped confession. In this statement, defendant admitted that he helped saw off the shotgun; that he knew Franz Williams intended to get money from the man; that Williams said he (Williams) might have "to shoot him because he knew me"; that defendant was sent to the back of the store to get a soda to divert Mr. Dave's attention; that defendant was at the back of the store when he heard the two shots; that Franz Williams had the shotgun, which he concealed under his coat[,] when they got out of the car; and that Williams was the triggerman.[4] Under this statement, of course, defendant would be guilty of capital murder as an accomplice, which the prosecutor recognized, submitted to the jury in the main instruction, and argued.

In his argument to the jury in the guilt phase of the case, the prosecutor[,] on at least seven occasions[,] stressed the voluntary character of defendant's confession and emphasized that, even if West were not to be

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[4] Franz Williams was not called as a witness by either side and did not testify in the Newlon Trial.

believed, the defendant by his own statement was still guilty of capital murder as an *accomplice* of Williams. For example: "I hope you're not going to disregard his confession . . . Rayfield was involved up to his neck." "[H]e didn't know when he gave that videotape[d] statement, [sic] that he said more than enough to convict him and convict himself of capital murder." "Either Franz Williams killed him and Rayfield was in the back of the store – which he said in the videotape, or Rayfield Newlon did the killing and Franz Williams was in the back of the store? Which is what?" "If you don't believe Walter West, we still have the videotape[d] confession, [sic] wherein the man admits to two good police officers after he voluntarily surrenders . . . and he thought he had just admitted to a robbery, but not a murder." And finally, just before bringing his final argument to a close, "but even if you disregard everything Walter said . . . but regardless you['ve] got the videotape[d] confession where he admits he was involved in the robbery[,] and all through this confession[,] he remarks that he knew a robbery was going to occur and involving a sawed-off shotgun, and that shotgun was pulled out before they went in the store and Franz said he might have to kill him."

As said earlier, the instruction on capital murder was in the disjunctive. It required only the jury find *either* "the defendant or another" killed Mr. Dave. To reach its verdict, the jury could have found that *either* Franz Williams or Rayfield Newlon shot and killed Mansfield Dave with two blasts of a shotgun during the course of a robbery. The jury could have found that the accomplices realized before entering the conveniency house that they might need to kill Dave to prevent identification and thus had

the requisite mental state. The jury could have believed defendant's videotaped statement, a copy of which they requested and received during deliberations, and disbelieved Walter West's testimony and still found defendant guilty under the instructions and principles of accomplice liability.[5] From the verdict it is impossible to determine whether the jury believed defendant to be guilty as a principal or as an accomplice. It therefore cannot be assumed, as the principal opinion does, that defendant was the triggerman. This is important because it bears directly on the question of whether the death sentence is disproportionate compared to similar cases considering both the defendant and the crime. The principal opinion does not attempt to justify the death penalty for defendant if he were guilty of capital murder as an accomplice.

III

Neither the state nor the defendant presented further evidence in the punishment stage of the trial, but both counsel argued to the jury. The state argued and submitted two aggravating circumstances to the jury: 1) "Whether the defendant murdered Mansfield Dave for the purpose of receiving money or any other thing of monetary value"; and 2) "Whether the murder of Mansfield Dave involved depravity of mind and that as a

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[5] The prosecutor, after the jury had returned a verdict of guilty of capital murder, in his punishment stage argument stated, "By returning your verdict in this case . . . that either means that you believe beyond a reasonable doubt that he pulled the trigger, or that he had the frame of mind that's consistent with pulling the trigger . . . "

result thereof it was outrageously or wantonly horrible or inhuman." The jury, in sentencing the defendant to death, found only the latter aggravating circumstance – "the murder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman." During it deliberations, the jury requested a definition of "depravity of mind." This request was denied.

Section 565.012.2(7) allows the jury to impose the death penalty if it finds that "[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." This aggravating circumstance requires a subjective, rather than an objective, finding by the jury. Theoretically, a jury could find that every intentional, deliberated murder involves "depravity of mind."

An aggravating circumstance similar to § 565.012.2(7) is found in the death penalty statutes of several states. The Georgia version, which authorizes imposition of the death penalty if "the murder was 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,' " Ga.Code Ann. § 27-2534.1(b)(7) (1978), was challenged in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) as being so broad that it would authorize imposition of the death penalty in every murder case. *Id.* at 201, 96 S.Ct. at 2938. In response, the United States Supreme Court stated that "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt

such an open-ended construction." *Id. Gregg* was followed by *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) where the petitioner's death sentence based on § 27-2534.1(b)(7) was reversed because "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey v. Georgia*, 446 U.S. at 433, 100 S.Ct. at 1767. The Georgia court, construing § 27-2534.1(b)(7) so that it would not become a "catch-all [sic]", stated that:

> Under the plain meaning of the statute, not only must the murder be outrageously or wantonly vile, horrible or inhuman, but in addition, the facts of the case must show either an aggravated battery to the victim, torture of the victim, or depravity of mind of the defendant as hereinafter explained.

Hance v. State, 245 Ga. 856, 268 S.E.2d 339, 345, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 611 (1980). Both the principal opinion and *State v. Mercer*, 618 S.W.2d 1, 5 (Mo. banc 1981)[,] emphasize that our death penalty statute is patterned after the Georgia statute.

This court, too, must construe this aggravating circumstance in such a way that the death penalty is not authorized for every intentional murder. It must insure [sic] that there is a principled way to distinguish between cases where the death penalty is or is not imposed. To make its proportionality review[,] as required by statute, § 565.014.3(3), this court must look at "the penalty imposed in *similar* cases, considering *both the crime and the defendant.*" (Emphasis added.) This court should look at sentencing patterns in similar cases. *See Blake v. Zant*, 513 F.Supp. 772 (S.D.Ga.1981).

To begin, we cannot be sure whether defendant or Franz Williams actually did the shooting. There is no way to tell under the evidence, the instructions, and the verdict. Certainly if defendant were only the accomplice and not the triggerman, there is not a single Missouri capital murder case (and the principal opinion makes no effort to cite one) which can be said to be similar where the death penalty was assessed against the accomplice or which would justify our upholding the death penalty here. The alternative[,] that defendant was found guilty of capital murder as an accomplice[,] is not considered or discussed in part VI of the principal opinion, the proportionality review. The sole basis on which the principal opinion affirms the death penalty is on the premise that Newlon actually killed the victim. I am certain if defendant were only the accomplice, the justification of the principal opinion for upholding the death penalty, at 622, based as it is on a recital of events supposed to have been performed by defendant *as the triggerman*, must fail.

I do not mean to say, or to be interpreted as saying, that an accomplice in a capital murder could never justifiably receive a death sentence. In the case before us, however, the justification for the death sentence is found by the principal opinion in the acts committed solely by the person who did the shooting: the firing of the first shotgun blast without warning or provocation and then reloading, leaning over the counter and firing the second blast while the victim lay bleeding on the floor, followed by starting to load the gun again. While this was going on, the accomplice, who was either defendant or Williams, was at the rear of the store, getting a bottle of soda pop. There is no evidence that the accomplice had any

hand in the way the actual killing was done, that it was planned between them to be done that way, or that the accomplice should have become aware that the principal was going to do it that way. As the principal opinion says, it was not necessary to do what was done in order to accomplish the robbery. It is the way the killing itself was done which is the justification found by the principal opinion for the death sentence. Under the facts and circumstances before us, the manner of killing cannot fairly be imputed to the accomplice as a basis for sentencing him to death also.

We also point out that the aggravating circumstance submitted by instruction 19 and found by the jury does not require that the jury make any determination as to whether defendant was the triggerman or the accomplice. The question posed to the jury by instruction 19 was "Whether the murder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman". This inquiry focuses on the act of murder itself, not on who was the murderer. The jury could believe the murder involved depravity of mind and was outrageously or wantonly horrible or inhuman without being required to determine whether it was defendant's "depravity of mind." The portion of the verdict specifying the aggravating circumstance found reads as follows:

> [W]e designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:
>
> Whether the murder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman.

This verdict does not resolve the question of whether defendant or Franz Williams committed the acts upon which the principal opinion rests its justification of the death penalty.

However, even if we assume, as does the principal opinion, that defendant fired the shots (something which we cannot assume under the instructions and verdict), the death penalty is disproportionate to the penalty imposed in similar or worse cases.

The prosecutor and the principal opinion characterize this murder as an "execution-type" killing. However, it is the *facts* of the respective homicides which we must examine, not the catch-phrase applied to them, because[,] under our statute[,] we are to examine proportionality of the sentence imposed to that imposed in similar cases. How do the *facts* of the killing of Mr. Dave and the punishment assessed against this defendant compare with the facts and punishment assessed in other cases where the defendant was convicted of capital murder?

The principal opinion cites cases it has compared with the instant case in determining that the death sentence is not disproportionate when applied to defendant Newlon for this particular crime compared to the penalty imposed in similar cases. In other words, it has made an attempt to distinguish cases on the assumption that defendant did the actual killing. *State v. Mitchell,* 611 S.W.2d 223 (Mo. banc 1981), is the first case cited. In *Mitchell,* the defendant was found guilty of *two* counts of capital murder committed during the course of a robbery of a liquor store. Both victims had been stabbed, one six to eight times[,] and the other approximately twelve

times. Both victims also had severe blows to the head. The jury was instructed on four aggravating circumstances, including "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." Because the jury was unable to agree on punishment, the defendant was sentenced to life imprisonment without chance of probation or parole for fifty years. Section 565.008.1.

A second case cited is *State v. Royal*, 610 S.W.2d 946 (Mo. banc 1981). In *Royal*, the defendant[,] during the robbery of a bank[,] abducted an employee, took her to a remote area in the county, and killed her. The victim had been shot three times with a .22 caliber gun. The jury, after being instructed on three aggravating circumstances, including § 565.012.2(7), recommended a life sentence.

A third case cited is *State v. Downs*, 593 S.W.2d 535 (Mo.1981). In *Downs*, the defendant was convicted of *three* counts of capital murder. Downs and two co-defendants [sic] entered a store to rob it. The husband and wife, owners of the store, were shot in the head. Their daughter, returning home from school, was pulled into the building and *shot despite her pleas for mercy*. The jury instructed on three aggravating circumstances, including § 565.012.2(7), recommended a life sentence. Downs was identified as the *triggerman* by one of his accomplices.

I cannot find a principled means to distinguish between the three cases cited[,] which are similar factually[,] and the instant case which [means] would justify sentencing Rayfield Newlon to death, yet justify sentencing defendants Mitchell, Royal, and Downs to life

imprisonment. In fact, looked at objectively, the murders in the cited cases were more "vile" and the murderers exhibited a greater "depravity of mind." In *Mitchell*, there were two victims, both killed by multiple blows and stab wounds. In *Royal*, the victim was kidnapped and driven to a remote rural area, a ride which must have become increasingly terrifying and ominous, prior to being shot three times. In *Downs*, there were *three* victims. In the instant case, there was one victim, killed by two shotgun blasts. In addition, there is no way to know whether Newlon was the triggerman or whether he was an accomplice.

A fourth case cited is *State v. Williams*, 611 S.W.2d 26 (Mo. banc 1981). In *Williams*, the defendant, after repeated efforts[,] had successfully solicited an acquaintance to kill her husband. The jury recommended life imprisonment. The only similarities to Newlon are that someone was killed, the defendant was convicted of capital murder, and the death penalty was sought, unless, of course[,] Newlon was an accomplice. If so, I cannot see how the depravity of mind of Mrs. Williams[,] as an accomplice in arranging for the paid murder of her husband[,] was any less reprehensible than Newlon's[,] as the accomplice of Franz Williams['], yet she received only life imprisonment.

The fifth case cited is *State v. Mercer*, 618 S.W.2d 1 (Mo. banc 1981). In *Mercer*, the defendant was convicted of capital murder. The victim was sexually abused by the defendant and others for an extended period of time and then strangled. Witness Campbell testified that he "found defendant straddling Karen's body with his hands on her throat. Defendant screamed at Campbell to take her pulse. Campbell grabbed the arm of Karen's seemingly

lifeless body and found a faint pulse. At the time he told defendant this, he could smell human waste which was all over the bed. Defendant 'hollered,' struck the left side of Karen's head, and said, 'Die, you bitch . . . . This is a leaky cunt. Die.' He continued strangling her, and again screamed at Campbell to take her pulse. Campbell found no pulse. When Campbell reported this, defendant got off the bed, grabbed Karen's legs, and pulled her off the bed. Defendant took the sheets and blankets to the washing machine and told Campbell to wipe the waste off the floor." *Id.* at 4. The jury, instructed on two aggravating circumstances, including § 565.012.2(7), returned the death penalty, which this court affirmed. The shooting of victim Dave by means of two shotgun shells during the course of an attempted robbery does not begin to equal the moral depravity exhibited by the defendant in *Mercer*, shown by the atrocities inflicted on his victim and set out above.

To achieve true proportionality review, we need to examine capital murder cases other than the few mentioned in the principal opinion and discussed above. *Cf. Ross v. State*, 233 Ga. 361, 211 S.E.2d 356, 359 (1974), *cert. denied*, 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154 (1976) (as earlier pointed out, our death penalty statute is patterned after Georgia's and has the same provisions as to independent review of the death penalty, including determination of proportionality of the death sentence) where the court stated "that nothing in the statute forecloses this court during the course of its independent review from examining non-appealed cases and cases in which the defendant pleaded guilty to a lesser offense." Even if we go no further in Missouri than to examine only cases

we have heard on appeal and affirmed, we should include such cases as *State v. Bostic*, 625 S.W.2d 128 (Mo.1981); *State v. Baskerville*, 616 S.W.2d 839 (Mo.1981); *State v. Holmes*, 609 S.W.2d 132 (Mo. banc 1981); *State v. Strickland*, 609 S.W.2d 392 (Mo. banc 1980); *State v. Ingram*, 607 S.W.2d 438 (Mo.1980); *State v. Hudgins*, 612 S.W.2d 769 (Mo.1981); *State v. White*, 621 S.W.2d 287 (Mo. 1981); *State v. Jensen*, 621 S.W.2d 263 (Mo. 1981); *State v. Chandler*, 605 S.W.2d 100 (Mo. banc 1980); and *State v. Borden*, 605 S.W.2d 88 (Mo. banc 1980). Otherwise, as set forth in *Godfrey v. Georgia, supra*, as the law is built up in this area, there is no way to distinguish a capital murder case in which the death penalty is imposed from the many cases in which it was not. We must establish standards for imposition of the death penalty to "serve both goals of measured, consistent application and fairness to the accused." *Eddings v. Oklahoma*, ___ U.S. ___ at ___, 102 S.Ct. 869 at 874, 71 L.Ed.2d 1 (1982).

In *Bostic*, defendant struck the victim on the head twice, then he and his son *dragged her down the alley* and loaded her in a van. The defendant *stepped on the victim's throat* when she regained consciousness. At some time defendant *had sexual intercourse* with the victim. The body was left in a ditch outside of town. The jury, instructed on the depravity of mind aggravating circumstance, recommended a life sentence.

In *Baskerville*, the defendant was convicted of *three* counts of capital murder. One victim was shot twice, one was shot once, and a third, *a child who begged for his life*, was shot once. The jury imposed the life penalty without possibility of parole for fifty years for the capital murders of the two adults and, because the jury was unable to

agree upon punishment for the capital murder of the child, the court assessed a life sentence, without possibility of parole for fifty years.

In *Holmes*, defendant stabbed his sixteen-year-old victim at least *sixty-four* times with an ice-pick-like instrument, an example of extreme torture and cruel death. It is hard to imagine a worse death for a teenager. Defendant *had twice announced his intention to kill the victim*, even saying that he was going to do it by stabbing the victim with an ice pick some sixty odd times. Because the state had waived the death penalty, Holmes was sentenced to life imprisonment.

In *Strickland*, defendant was convicted of one count of capital murder and two counts of second degree murder. The victims were tied and then shot with a pistol and a shotgun. *Three were killed* and one wounded. The defendant and two or three others had intruded upon a party and also ransacked the house. The state waived the death penalty after the guilty verdict.

In *Ingram*, defendant shot and killed a casual acquaintance as he, the victim and their two consorts were driving around Bull Shoals Lake. All had been drinking beer. An argument ensued between defendant and the victim, who was driving. Defendant said he would use the shotgun on the victim if the latter did not stop the car and let him out. The victim[,] in effect[,] said to [go] ahead, "if you've got the guts", whereupon *defendant shot the victim in the head with a sixteen-gauge shotgun*. The state waived the death penalty.

In *Hudgins*, defendant's landlord died from loss of blood after he stabbed her *twenty-one times as well as*

strangling her. Some of the wounds were seven inches deep. Defendant *then strangled her six-year-old son* with an extension cord and placed the body in a bathtub filled with water. He was found guilty by a jury of capital murder, but sentenced only to life imprisonment without parole for fifty years. He was also convicted of second degree murder.

In *White,* defendant agreed to commit murder for hire. He made an *unsuccessful attempt wherein he shot the victim and beat her with a lead pipe.* After the victim recuperated, defendant entered her home, *bound and sexually [a]nished her* and then killed her by *cutting her throat from ear to ear* and the back of her neck, *nearly severing her head from her body.* Defendant was convicted of capital murder and the jury assessed life imprisonment without parole for fifty years.

In *Jensen,* defendant robbed the safe in the restaurant where he worked. He then proceeded to ransack the premises to make it appear a burglary had occurred[,] but was surprised by the arrival of the manager. *After an unavailing attempt to dissuade the manager from calling the police, defendant shot and killed her.* He was convicted of capital murder and the jury assessed punishment at life without possibility of parole for fifty years.

In *Chandler,* defendant was convicted of capital murder. The jury assessed life imprisonment without parole for fifty years. The facts were that he and two others went to the law office of the victim at night. Defendant held a gun on the victim and took his money. Then, rather than shooting [sic] the victim and possibly attracting [sic] the attention of outsiders, *defendant first stabbed the victim in*

the stomach (to get defendant's hands away from protecting his throat) and then[,] *while the victim was imploring God not to let the man kill him, defendant deliberately cut the victim's throat.*

In *Borden*, defendant wife, after failing over a period of several months to induce the man with whom she was having an affair to do the *job, executed her husband by shooting him with a sawed-off .22 caliber rifle while he was watching television. Their two children were also present in the house. Defendant had her paramour strike her and tie up the children in an attempt to divert suspicion.* Defendant was convicted of capital murder[,] and the jury fixed the punishment at life imprisonment without possibility of parole for fifty years.

The capital murders in the ten cases just described constitute a veritable "chamber of horrors". The instant case falls far short of these capital murders (many of which involved multiple victims) in terms of torture, duration of the victim's suffering, nature of the wounds, agony, or infliction of pain and suffering. Yet[,] in not one was the death penalty assessed. Where is the proportionality or the consistency or the principled manner by which we can declare that the sentence of death in the case before us is not excessive or disproportionate when compared to the penalty imposed in the above cases, all of which involved depravity and conduct outrageously or wantonly horrible or inhuman? How do we distinguish in a principled way this case, where the death penalty is based on the aggravated circumstance that the murder "involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman", from those above? Is the *Mitchell* case, or *Royal*, or *Downs*,

or *Williams*, or *Bostic*, or *Baskerville*, or *Holmes* or *Strickland* or *Ingram* or *Hudgins* or *White* or *Jensen* or *Chandler* or *Borden* any less depraved or less outrageously or wantonly horrible or inhuman than the present case? That question cannot be answered affirmatively, in my opinion.

As the Supreme Court of the state, we are obliged by law to examine the sentence of death to make sure that it is not excessive or disproportionate to the penalty imposed in similar cases. This the jury is not required or able to do. If Newlon's death sentence is affirmed, he is being marked for death capriciously, one randomly selected from a group of capital murderers whose crimes are of equal or greater depravity than his. We will thereby permit the jury verdict to accomplish what our death penalty review is supposed to avoid – application of the death penalty in an arbitrary and capricious manner – contrary to the mandate of our statute and the decisions of the United States Supreme Court. The Supreme Court in *Eddings v. Oklahoma, supra*, reaffirmed this mandate, stating that the decisions of the Court reflect "the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency or not at all." 102 S.Ct. at 875.

The court in *State v. Culberth*, 390 So.2d 847 (La.1980) reversed the defendant's death sentence and remanded for resentencing. Defendant was found guilty of killing a young woman. The state asserted that "the infliction of five stab wounds on the helpless victim constituted an especially heinous, atrocious or cruel manner of killing." *Id.* at 850. The court, in holding that the evidence did not support submission of this circumstance, stated:

> Obviously, it was not intended that all murders fall in this category, even though it can be said that murder, itself, is a heinous, atrocious and cruel crime. We have stated that the concept of heinousness must necessarily include "some idea of torture or the pitiless infliction of unnecessary pain on the victim." *State v. English,* [367 So.2d] [815] at 823 [(La. 1979)]. Such a construction is necessary to protect the statute from attack on grounds of vagueness and overbreadth and to provide adequate guidelines for those involved in the sentencing process. *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In this case the defendant did not torture or abuse the victim before her death. The wounds were inflicted to kill, not to maim or to inflict pain.

Id. at 851.

Whether we conclude the evidence does not support imposition of the death penalty or that the sentence is disproportionate for the crime, the death penalty cannot be imposed. As in *Culberth,* this was a killing with intent to kill, not with intent to maim or wound. This is recognized by the prosecutor in closing argument when he argued that Newlon shot Mr. Dave a second time "to make sure nobody would live to identify him in the Courtroom." The principal opinion speculates the second shot fired was to mutilate the corpse, but there is no evidence to support this, nor was any such theory advanced by the prosecutor to the jury. If the killer were truly motivated by a desire to mutilate, he would have fired the second shot into the deceased's head and face, not his shoulder.

"The instantaneous death of a victim as a result of being killed by a gunshot, although the scene of death be

gruesome (no other facts appearing), does not constitute torture, aggravated battery or depravity of mind." *Hance v. State, supra,* 268 S.E.2d at 346. In this case, there were "no other facts appearing", other than the characterization by the prosecutor and principal opinion that this was an "execution-style killing." The sawed-off shotgun was, most definitely, a lethal weapon, but it is a weapon used to kill, not to torture. Its use results in a bloody, gruesome scene as shown by the photographs entered into evidence by the state (Exhibits 7, 8, and 9). This does not, however, reflect "depravity of mind" any more than the use of any other weapon. The principal opinion would supply "other facts" by pointing out that this was a single-action shotgun and thus required reloading. The gun is a simple self-ejecting weapon, easy to load, and would require, at the most, a few seconds to fire and reload.

The principal opinion relies on *Turner v. Commonwealth,* 221 Va. 513, 273 S.E.2d 36 (1980)[,] to support its position that the death penalty is appropriate in this case. In *Turner,* the jury found both statutory "[c]onditions for imposition of death sentence": 1) "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society" or 2) "that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va.Code § 192-264.2(Supp.1981). I am unable to agree with the principal opinion that the facts in *Turner* are "strikingly similar to these before us." Turner, during the course of a robbery, held four people hostage, (including a police officer) in the store for a short period of time.

He shot the owner in the head, wounding him[,] but not fatally, and then talked to one of the hostages. Two of the hostages escaped after which Turner told the officer that he was going to kill the owner because he had set off an alarm. Turner then fired two shots at the owner which were fatal. Additionally, Turner had a history of violent crime.[6] He had been convicted of malicious maiming, escape, unlawful wounding, malicious wounding, and second degree murder. *Id.* 273 S.E.2d at 44, n.11. The defendant argued that the evidence did not support the "vileness" condition. In response, the court stated that the initial wound to the head, which was not the cause of death, was an aggravated battery. But, it added, that "[e]ven if Turner's crime did not meet the 'vileness' standard, imposition of the death penalty would be permissible under the 'dangerousness' standard." *Id.* at 45. The court pointed out that defendant's criminal record "is one of the most extensive we have reviewed" under this provision of the statute. *Id.* at 47. This case is clearly distinguishable: 1) the jury found two statutory aggravating circumstances; 2) the defendant in Turner had a history of violent crime[,] which Newlon did not; and 3) the opinion relies mainly on the "dangerousness" aggravating circumstance, which is not the aggravating circumstance relied upon here.

IV

In addition, I would reverse the death sentence and remand for resentencing because the sentence of death

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[6] Newlon did not. His prior crimes were burglary, stealing and larceny.

was imposed under the influence of passion, prejudice, and other arbitrary factors, § 565.014.3(1), generated in the minds of the jurors by the improper and provocative words of the prosecutor. I must conclude that the prosecutor overstepped all bounds of permissible argument by injecting appeals to the passions and prejudices of the jurors and appeals for return of the death sentence for reasons foreign to the clear mandate of our death penalty statute[,] that death can properly be assessed only if there is a sufficient aggravating circumstance or circumstances and for no other reason. Section 565.012. In so doing, the prosecutor violated the ABA Standards for Criminal Justice, Standards 3-5.8(c) and (d)[,] which state:

> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law.

As was stated in *United States v. Sanders*, 547 F.2d 1037, 1043 (8th Cir. 1976), "Prosecutors may strike hard blows but not foul ones."

Most, if not all, of the arguments set forth, *infra*[,] were not objected to. Our duty, however, under § 565.014, is to determine whether the death sentence was imposed under the influence of "passion, prejudice, or other arbitrary factors." The absence of an objection does not relieve us of the affirmative duty to make our own independent appraisal, nor does the mere absence of an objection change the nature of what was said and its effect

upon the jury. The remarks of the prosecutor to which I refer below were not casual remarks. They were made to make an imprint on the jury, to obtain a death verdict for the reasons advanced. We should not permit a death verdict to stand where illegitimate argument formed a major part of the prosecutor's appeal to the jury.

First, the prosecutor argued that the jury should impose the death penalty because it had not been imposed previously under our present death penalty statute, clearly a non-statutory ground and constituting no legitimate reason why this defendant should be singled out. This argument focuses on making use of the death penalty just because it has not yet been used, not on its appropriateness for Rayfield Newlon.

> Do you know how many people are on death row in this State? None. We've got the death penalty, but how many are there? None. Mr. Newlon will be the first one, if you put him on death row.

Second, the prosecutor appealed to the jury's sense of not wanting to seem "gutless" by asking them to return the death penalty to demonstrate they had the courage to do so. This is not a justifiable reason for sentencing defendant to death.

> As sure as he sits there, he doesn't think you have the guts to do it.
>
> * * *
>
> Once again, I hope you have the courage to do that [return the death penalty] because it's tough.

Third, the prosecutor misstated the law by arguing that the death penalty was appropriate solely because the

defendant had been convicted of capital murder, that because he had killed someone he deserved in return to die. Under this argument, the jury is urged to look no further than guilt of capital murder. This is not the law.

> But, if somebody is guilty of capital murder[,] the ultimate crime, why should they get anything other than death?
>
> * * *
>
> Now, there are questions on whether it deters or not, but let me say this to you: if it doesn't deter crime by taking Mr. Newlons' life, and it doesn't deter anyone else out in the community – what harm has been done? . . . At the very worst, if it doesn't, you have simply given Rayfield what he deserves and that's an "eye for an eye and a tooth for a tooth" and that's what, I submit, this is all about, and I submit to you, that there is nothing wrong with that.

Fourth, the prosecutor argued the jury should impose the death penalty rather than life without parole for fifty years, because if the latter were selected[,] there was no assurance the legislature might not change the law or that the sentence might not be commuted. These speculative possibilities do not constitute aggravating circumstances. Under this line of argument, life imprisonment without parole for fifty years would never be an appropriate punishment.

> [T]hat's no big deal . . . what assurances do you have that he'll be there fifty years? The legislature could change the law. All it says is no parole. It doesn't say it can't be commuted. There's no assurance of that at all.

Fifth, the prosecutor sought to inject an implication as to what the trial judge's personal feelings were about

what punishment should be assessed by ostensibly explaining what the law was if the jury could not arrive at a unanimous decision, but leaving the impression that if the trial judge had his way[,] the sentence would not be life:

> The Judge[,] in his instructions[,] is going to tell you that you have two choices. . . .[I]f you can't come to a unanimous decision, he then will impose sentence, which will be a life sentence without parole for 50 years. Now, I want you to understand that Judge Ruddy is required by law to give you that instruction. . . . Now, that in no way is meant to indicate his Honor's personal feeling as to what the sentence should be. So, don't interpret that to mean that the Judge in this case feels Rayfield Newlon's punishment should be life, [sic] and not death.

Sixth, the prosecutor sought to relieve the jury of taking full responsibility for its verdict by directing their attention to post-trial procedures. The jury is supposed to decide the issue of appropriate punishment on the evidence before them, not on the basis that it is possible the reviewing authorities may temper their verdict later on.

> Now, if you say he deserves the death penalty, under the law, Judge Ruddy must review it[,] and if he agrees, then his decision is reviewed by the Supreme Court.

The question before the jury at the punishment stage was whether there was present an aggravating circumstance sufficient to warrant the imposition of death. Section 565.012.5. The prosecutor, by these improper arguments, diverted the jury from consideration of its statutorily defined duty to consideration of arbitrary and emotional factors. These arguments had a direct bearing

on the verdict, *as they were intended to have*. This is sufficient reason to reverse the death sentence. But, of even greater importance is the conclusion that, when we compare this capital murder to the many other horrible capital murders we have affirmed on appeal[,] where the punishment assessed was life without possibility of parole for fifty years, not death, the death sentence is a disproportionate penalty for this particular crime and for this particular defendant, even if he were the actual killer, and especially so when we cannot know whether the jury decided the defendant was the triggerman or the accomplice.

I would reverse the death penalty and remand for resentencing.

(p. 595) *INSTRUCTION NO. 15*

You have found the defendant guilty of capital murder. At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must imposed for that offense.

The punishment prescribed by law for capital murder is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole until the prisoner has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 16

It is your duty to follow the Instructions and the law as the Court gives them to you. However, no statement, question, ruling or remark that I have made or may make during the entire trial is intended to indicate my opinion of what the facts are or what the punishment should be. That will be your responsibility. In performing that duty you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

INSTRUCTION NO. 17

You will now hear argument by the Prosecuting Attorney and by Council [sic] for the Defendant regarding the punishment to by [sic] imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

(p. 596) You will bear in mind that it is your duty to be governed by the evidence as you remember it, the

reasonable inferences which you believe should be drawn, and the law as given in instructions of the Court.

After Council [sic] has [sic] argued the matter, the Court will give you further and final instructions concerning the law relating to the punishment. It is your duty and yours alone to decide upon the punishment to be imposed upon the defendant and to render such verdict under the law and the evidence.

The State's attorney must open the argument. Council [sic] for defendant may then make his argument. No further argument is permitted by either side.

* * *

(p. 612) *INSTRUCTION NO. 18*

The law applicable to this stage of the trial is stated in these instructions and those which were read to you

when we began this phase of the case. All of these instructions will be given to you to take to your jury room for use during your deliberations.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

I do not mean to assume as true any fact referred to in these instructions but leave it to you to determine what the facts are and what the punishment should be.

INSTRUCTION NO. 19

In determining the punishment to be assessed against the defendant for the murder of Mansfield Dave, you must first unanimously determine:

1. Whether the defendant murdered Mansfield Dave for the purpose of receiving money or any other thing of monetary value.

2. Whether the murder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or (p. 613) disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by

the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 20

If you find and believe from the evidence beyond a reasonable doubt that one or more of the circumstances submitted in Instruction No. 19 exist and that at least one of them is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of defendant. In deciding that question you may consider all of the evidence relating to the murder of Mansfield Dave.

You may also consider any of the aggravating circumstances referred to in Instruction No. 19 which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his (p. 614) punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 21

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 20, it will then

become your duty to determine whether a sufficient mitigating circumstance of circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Mansfield Dave.

You may also consider.

1. Whether the defendant was an accomplice in the murder of Mansfield Dave or whether his participation was relatively minor.

2. Whether the defendant acted under extreme duress or substantial domination of another person.

3. The age of the defendant at the time of the offense.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until (p. 615) he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 22

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

INSTRUCTION NO. 23

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the verdict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Mansfield Dave, your foreman must write into your verdict all of the aggravating circumstances submitted in Instruction No. 19 which you found beyond a reasonable doubt.

If, after considering all of the evidence and instructions of law, you decide that the defendant must be punished for the murder of Mansfield Dave by imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence, your foreman will sign the verdict form so fixing the punishment.

(p. 616) When you have concluded your deliberations[,] you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the court will fix the defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence. You will bear in mind, however, that under

the law it is your primary duty and responsibility to fix the punishment.

* * *

Ladies and Gentlemen, you will now begin your deliberations on the second phase of this case. The admonishment given to you earlier, [sic] is hereby removed and you are to retire to your jury room. If you have any questions, please write them out in longhand, and give them to the Bailiff.

JURY BEGINS DELIBERATIONS ON SECOND PHASE OF CASE

THEREUPON, at the approximate hour of 10:30 am, the Court calls temporary recess, and the members of the jury begin their deliberations on the second phase of subject case.

* * *

(p. 619) *NOTE SENT FROM THE JURY*

FURTHER THEREAFTER, at the approximate hour of 11:30 a.m., the Defendant's Attorney, Mr. Ayers, being present, and Mr. Westfall, being present, the following record is made in Division No. 14, St. Louis County Circuit Court, outside the hearing of the members of the jury:

THE COURT: Let the record show, that it is now 11:30 a.m., and this note just came back from the jury:

"Please give a definition of 'depravity of mind'."

Signed by, A. Arnold.

And I told them that I could not give them any further instructions.

* * *

JURY RETURNS VERDICT

FURTHER THEREAFTER, at the approximate hour of 1:05 p.m., Court reconvenes, and the Defendant[,] being present, [sic] with his Attorney of Record, Mr. Ayers, and the State of Missouri, being represented by and through, Prosecuting Attorney, George Westfall, the following proceedings are continued, heard by The Court and the members of the jury:

(p. 620) THE COURT: Mr. Arnold, please answer just yes or no. Has the jury reached a decision?

MR. ARNOLD: A Yes, they have, Your Honor.

THE COURT: Please fold the papers and hand them to the Bailiff.

(THE COURT CONTINUING)

Ladies and Gentlemen, please rise and hear your verdict:

VERDICT

We, the jury, having found the defendant guilty of the capital murder of Mansfield Dave, fix the punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

Instruction No. 19.

Aggravating Circumstance No. 2.

Whether the murder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman.

Signed, Amos Arnold, Foreman.

Supreme Court, U.S.
FILED
APR 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

APR 20 PM 2

No. 89-1372

In The

Supreme Court of the United States

October Term, 1989

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

RAYFIELD NEWLON,

Respondent.

RESPONDENT'S REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

Petitioner's representation as to what constitutes the facts in this case stretches the jury's finding of guilt to its extremes. The Missouri Supreme Court's opinion refers only to what the "jury could reasonably have found" State v. Newlon, 627 S.W.2d 606, 609 (Mo banc), cert. denied, 459 U.S. 884 (1982) (App. 119) and a thoughtful analysis of the verdict options available to the jury leads one to the inescapable conclusion that the jury, more likely than not, concluded that Newlon was not the murderer, but was an accomplice.

Missouri law requires that the reviewing court "accept[ ] as true all evidence in the record tending to prove the defendant's guilt . . . together with favorable inferences that can be reasonably drawn therefrom and disregard[ ] all contrary evidence and inferences." State v. Morgan, 592 S.W.2d 796, 805 (Mo banc) vacated on other grounds, 449 U.S. 809 (1980). Applying this widely-accepted rule, the Court drew its inferences accordingly. Significantly, the jury never found nor were they required to find that Newlon actually murdered the victim, Mansfield Dave. State v. Newlon, 627 S.W.2d at 624 (Seiler and Bardgett, JJ., dissenting) (App. 155-156) ("the jury could have found that the defendant, instead of being the principal, was an accomplice of Franz Williams, and that Williams did the shooting . . . [b]ecause the verdict-directing instruction required only that the jury find either 'the defendant or another' killed [the victim]".) State v. Newlon, 627 S.W.2d at 624 (App. 156)

(emphasis in original).

When charged at the penalty phase of the trial with an instruction (Instruction 19, App. 184) that specifically required a finding that "'defendant [and not someone else] murdered Mansfield Dave for . . . money'" the jury found the evidence lacking and acquitted him of that aggravating circumstance. The jury found only that "the murder [not the murderer] of [the victim] involved depravity of mind ***.'" Newlon v. Armontrout, 885 F. 2d 1328, 1338 (8th Cir. 1989) (App. 25) (App. 190).

After exhausting State remedies, the Respondent filed his Petition for Writ of Habeas Corpus in the District Court. After an evidentiary hearing, the District Court found constitutional violations in each of the four arguments Petitioner advanced and granted the Writ. Newlon v. Armontrout, 885 F. 2d 1328, (App. 25) (App. 56, 62-65, 69). The United States Court of Appeals for the Eighth Circuit, in affirming the District Court's holding, did not deem it necessary to address Newlon's Sixth Amendment claim of ineffectiveness of trial counsel (App. 7 n.5), or his claim of Lockett error in the penalty-phase instructions.

ARGUMENT

I.

THE COURT OF APPEALS' CORRECTLY HELD THAT A "DEPRAVITY OF MIND" INSTRUCTION WHICH IS NOT CAPABLE OF OBJECTIVE DETERMINATION BY THE SENTENCER AND NOT SUBJECT TO A LIMITING CONSTRUCTION BY THE MISSOURI SUPREME COURT VIOLATES THIS COURT'S HOLDING IN GODFREY V. GEORGIA, 446 U.S. 420 (1980) AND MAYNARD V. CARTWRIGHT, 108 S. CT. 1853 (1988).

Petitioner correctly notes that this "Court has gone to great lengths" to determine whether statutory aggravating circumstances sufficiently channel the jury's discretion in imposing a death sentence (Pet. Br. 10). Since Godfrey v. Georgia, 446 U.S. 420 (1980), this Court has recognized that the language of this and similar instructions cannot "'make rationally reviewable the process for imposing a sentence of death'" because it lacks "'clear and objective standards' that provide 'specific and detailed guidance'" sufficient to properly "channel the sentencer's discretion." Id. at 428-429, quoting Proffitt v. Florida, 428 U.S. 242, 253 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) and Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Similar aggravating circumstances[1] were constitutionally salvageable only because the statutes could be interpreted to empower the state supreme courts with the capacity to genuinely narrow the class of persons eligible for the death penalty in such a way as to reasonably justify the imposition of a more severe punishment to the death-sentenced defendant when

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[1] Maynard v. Cartwright, 108 S. Ct. at 1858-59.

compared to others found guilty of murder. Zant v. Stephens, 462 U.S. 862, 877 (1983); cf., Gregg v. Georgia, 428 U.S. 153 (1976). If not narrowed, these aggravating circumstances violate the fundamental constitutional requirement of the eighth amendment because the risk of "wholly, arbitrary and capricious" infliction of the death penalty would not be sufficiently minimized. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Gregg v. Georgia, 428 U.S. 153, 189, 206-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). See also, Clemons v. Mississippi, #88-6873, slip op. p. 13 n.1 (Blackmun, Brennan, Marshall and Stevens, JJ., concurring in part, dissenting in part) (the majority opinion necessarily implies that the aggravating factor "especially heinous, atrocious or cruel" is unconstitutional).

In this case, the jurors' request for a definition of the ambiguous phrase, "depravity of mind," vitiates any claim Petitioner could advance that the sentencer could have been guided by "'clear and objective standards'". Godfrey v. Georgia, 446 U.S. at 428, because the sentencer's discretion obviously could not have been channeled by an instruction that they probably did not understand. As a result, Petitioner implies that the sole basis for the Court of Appeals' affirmance of the District Court was its obvious conclusion that the jury had no idea what was meant by the instruction's requirement that the murder involve "depravity of mind" (App. 189). The opinion of the Court of Appeals belies such a conclusion. The District Court was affirmed because "the Missouri Supreme Court did not

provide a limiting construction of the term, [depravity of mind], sufficient to satisfy the eighth amendment requirements of Godfrey and Cartwright." Newlon v. Armontrout, 885 F. 2d at 1335 (App. 18).[2]

Petitioner argues that the sentence can be rescued because the Supreme Court of Missouri, six years after its decision in this case, finally held that certain specified factors "must be present before a finding of depravity of mind will be supported by the evidence". State v. Griffin, 756 S.W.2d 475, 490 (Mo banc 1988), cert. denied, 109 S. Ct. 3175 (1989). The factors delineated in Griffin were first conceived in State v. Preston, 673 S.W.2d 1 (Mo banc), cert. denied, 469 U.S. 893 (1984) and included two factual predicates allegedly found by the Missouri Supreme Court in this case, torture and mutilation of the corpse.[3] Neither finding was supported by the evidence. In

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[2] "[T]he 'especially heinous, atrocious or cruel' aggravating circumstance cannot be constitutionally submitted to the jury without a limiting instruction." Clemons v. Mississippi, supra, slip op. p. 15, n.8 (Blackmun, Brennan, Marshall and Stevens, concurring in part, dissenting in part).

[3] The Missouri Supreme Court in Preston, in performing its proportionality review, characterized Newlon's sentence by concluding that there was "[e]vidence of physical torture before death." Preston, 673 S.W.2d at 12. The sentencing jury, however, was never authorized and never found that the victim was tortured. (App. 190). The instructions submitted to the jury omitted any reference to torture (App. 66) even though such a submission, if supported by any evidence, was authorized by the statute:

> (7) The offense was outrageously or wantonly vile, horrible or inhumane in that it involved torture, or depravity of mind. Section 565.012.2, RSMo. 1978.

Preston, the Court considered depravity of mind to include the "infliction of physical or psychological torture upon the victim as when [sic] victim has a substantial period of time before death to anticipate and reflect upon it[.]" Id. at 11. There was absolutely no evidence in this case that the victim ever anticipated his death or felt any physical pain or mental anguish.

The second Preston factor, mutilation of the corpse is also not supported by the facts.

> The principle opinion speculates the second shot fired was to mutilate the corpse, but there is no evidence to support this, nor was any such theory advanced by the prosecutor to the jury.

State v. Newlon, 627 S.W.2d at 632 (Seiler and Bardgett, JJ., dissenting) (App. 174). If the Missouri Supreme Court's mutilation rationale is accepted, all multiple-wound homicides will justify sentencing the defendants to death; hardly a "limiting construction . . . sufficient to satisfy the eighth amendment requirements of Godfrey and Cartwright." Newlon v. Armontrout, 885 F. 2d at 1335 (App. 18). Simply reciting its version of the facts and opining that "'the record supports the finding of depravity.'" does not "indicate that the [Missouri Supreme Court] applied the limiting construction adopted in Preston and Griffin." Newlon v. Armontrout, 885 F. 2d at 1335 (App. 18).

Petitioner's reliance on Preston further compromises Respondent's rights and violates the fundamental principles

embodied in the due process clause of the Fourteenth Amendment and the Ex Post Facto clause of the Constitution. Fair notice of the acts that will be subject to punishment is "fundamental to our concept of constitutional liberty" Marks v. United States, 430 U.S. 188, 191 (1977); accord, Weaver v. Graham, 450 U.S. 24, 28-29 (1981), and includes notice of what penalty will be applied. "Central to the ex post facto prohibition is a concern for "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Miller v. Florida, 107 S. Ct. 2446, 2451 (1987), quoting from Weaver v. Graham, 450 U.S. at 30.

The ex post facto clause has prohibited the enforcement of any law which "aggravates a crime . . . changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 U.S. (3. Dall.), 386, 390-91 (1798) (Chase, J.). Judicial construction, as is present in Preston, which alters or expands criminal liability, may not be applied to conduct occurring before it is announced, in the same way that statutes creating crimes or increasing punishments may not be retroactively applied. Marks v. United States, 430 U.S. 188, 191-92 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964); see Rabe v. Washington, 405 U.S. 313 (1972). Because "fair warning of that conduct which will give rise to criminal penalties . . . is fundamental," Marks v. United States, 430 U.S. at 191, the due process clause must apply. The language of Missouri's "outrageously or wantonly vile, horrible or inhumane"

circumstance fails to give adequate due process notice because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhumane.'" Godfrey v. Georgia, 446 U.S. at 428-429. Preston's expansion of criminal liability is ex post facto as to crimes committed before the judicial limitation because it is both "retrospective" and it "disadvantage[s] the offender affected by it." Weaver v. Graham, 450 U.S. at 29. See also, Lanzetta v. New Jersey, 306 U.S. at 456 ("[I]t will be hard to hold that, in advance of judicial utterance upon the subject, [Newlon was] bound to understand the challenged provision according to the language later used by the [Missouri Supreme C]ourt.").

Petitioner's claim, that the Missouri Supreme Court has narrowly applied or construed this statutory provision, is refuted by that court's track record. Of the 68 death cases the Missouri Supreme Court has reviewed[4], 52 have submitted this aggravating circumstance to the jury. Those juries failed to find the existence of the challenged circumstance in only six cases. Of the remaining 46 cases, none have been overturned by the Missouri Supreme Court either on the grounds that this circumstance required a more narrowed construction because it had

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[4] The fact that in 76% of the death cases in this State have been submitted with this circumstance substantiates its popularity among prosecutors as a "catch-all" provision.

been too broadly applied or was unsupported by the record.* E.g., Clemons v. Mississippi, supra, at page 15. (Blackmun, Brennan, Marshall and Stevens concurring in part and dissenting in part).

In his concurring opinion in Preston, Judge Blackmar, noting that the analysis of Godfrey in Judge Seiler's dissent in Newlon's direct appeal "seems essentially sound", nonetheless felt bound by the holding in Newlon even though this respected jurist "simply [could not] believe [that the evidence in Newlon's case] . . . was sufficient under Godfrey v. Georgia . . . ." State v. Preston, 673 S.W.2d at 13. Judge Blackmar's misgivings about the Missouri Supreme Court's justification for affirming the sentence in this case were not displaced. Both the District Court and the Court of Appeals correctly concluded that "the risk of arbitrary and capricious action" violated the eighth amendment. Maynard v. Cartwright, 108 S. Ct. at 1858 (citations omitted) (App. 14) (App. 68).

This Court should deny the Petitioner's request that a Writ of Certiorari be issued.

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* The only time the Missouri Supreme Court has ever set aside a death sentence was when it concluded that the sentence was disproportionate to the life sentence imposed on a co-defendant. State v. McIlvoy 629 S.W.2d 333 (Mo banc 1982).

ARGUMENT

II.

THE COURT OF APPEALS CORRECTLY HELD THAT THE PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT DEPRIVED RESPONDENT OF A FAIR TRIAL IN VIOLATION OF HIS RIGHTS TO DUE PROCESS OF LAW.

The Petitioner, in his Questions Presented for Review, contends either that: (1) this Court's holding in Teague v. Lane, 109 S. Ct. 1060 (1989) precludes the relief granted Respondent by the District Court and the Court of Appeals even if those courts correctly concluded that Respondent's due process rights were violated by the prosecutor's penalty phase closing argument; or (2) those two courts were wrong in finding the argument constitutionally infirm. Since the Petitioner does not specifically address the latter point in his argument for certiorari, it is not necessary to argue the merits of the courts' decisions. It is sufficient to simply note that the standard set by the prosecutor's argument and its condonation by the Missouri Supreme Court has been considered synonymous with legalized lynching.[6]

The Petitioner characteristically misstates the Court of Appeals' holding when he asserts that the court did not find that

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[6] "[Since] State v. Newlon, 627 S.W.2d 606 (Mo banc 1982), [t]he word is out that 'anything goes' at the penalty phase. Missouri justice should adhere to a higher standard. The penalty phase should not become a legalized lynching." State v. Leisure, 749 S.W.2d 366, 385 (Mo banc 1985) (Blackmar, J., concurring in part and dissenting in part). The analogy to a lynch mob is embodied in the rallying cry of the prosecutor to this jury: "kill him now. Kill him now." (App. 35-36); See also (App. 33) ("I say to you to kill him . . . .").

the prosecutor's penalty phase closing argument violated the Eighth Amendment. (Pet. Br. 16). It is not true that the court "did not find an Eighth Amendment violation"; rather the court believed that "[t]here was prejudice enough without relying on the Caldwell claims" and accordingly found no need to "address" them (App. 21 n.9) (emphasis added).

To support its Teague claim, Petitioner postulates that the District Court and the Court of Appeals created new law and applied it retroactively.[7] Petitioner identifies two aspects of the Court of Appeals' opinion to support this conclusion: (1) the cases cited in that portion of the opinion were decided after Respondent's conviction became final (October 4, 1982) (App. 13); and (2) the Court of Appeals' did not specifically cite to Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Both arguments are specious. Although the Court of Appeals did not specially cite Donnelly, its controlling influence pervades the Court's analysis of the principles necessary to reach the result dictated by Donnelly. All but one of the cases cited to in the Court of Appeals' opinion are based on, and therefore dictated by, this

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[7] Ironically, the identical argument Petitioner contends cannot be countenanced in this portion of his argument comprises his sole justification for reversal of the Court of Appeals' Cartwright holding, i.e., that the limiting construction held necessary in State v. Griffin, 756 S.W.2d 475 (Mo banc 1988); cert. denied, 109 S. Ct. 3175 (1989) should be applied retroactively to justify Newlon's sentence and its affirmance by the Missouri Supreme Court.

Court's decision in Donnelly.* The only case which does not cite to Donnelly, Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), cert. denied, 478 U.S. 1620 (1986), utilized Donnelly's a comparable fundamental fairness standard articulated in Strickland v. Washington, 466 U.S. 684-685, 696 (1984). The 11th Circuit held that improper argument rendered the penalty phase trial fundamentally unfair because it "'undermine[s] confidence in the outcome' of [the] sentencing proceeding." Id. at 1461.

The Court of Appeals and the District Court measured the damage done by the prosecutor using the due process yardstick of Donnelly and its progeny. Both found that "the jury was subjected to a relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing process" and as a

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* Each case cites to Donnelly as the benchmark for establishing the appropriate standard for review. Caldwell v. Mississippi, 472 U.S. 320, 337-340 (1985); Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir.) (en banc), cert. denied, 483 U.S. 1023 (1987) (Petitioner "must show that there is a reasonable probability that the error complained of effected the outcome of the trial"); Darden v. Wainwright, 477 U.S. 168, 181 ("The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' [citation omitted] moreover, the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power'" (quoting from Donnelly at 642); Moore v. Wyrick, 760 F.2d 884, 886 (8th Cir. 1985); Tucker v. Kemp, 762 F.2d 1293, 1295 (11th Cir. 1986) ("whether the proceeding at issue was rendered fundamentally unfair by the improper argument") (emphasis supplied); Brooks v. Kemp, 762 F.2d 1383, 1411, 1413 (11th Cir. 1985) (en banc) vacated on other grounds, 478 U.S. 1016 (1986) ("whether the improper argument rendered the sentencing fundamentally unfair"); Coleman v. Brown, 802 F.2d 1227, 1233, 1234 (10th Cir. 1986), cert. denied, 482 U.S. 909 (1987).

result "infect[ed] the penalty proceedings with an unfairness that violates due process." (App. 55-56) (App. 26).

Petitioner argues that certiorari should be granted because due process review of the propriety of penalty-phase argument has not yet been authorized by this Court. Petitioner overlooks that this Court, since 1977, required that all capital-sentencing proceedings must satisfy the dictates of the due process clause, Gardner v. Florida, 430 U.S. 349, 358 (1977); Green v. Georgia, 442 U.S. 95, 97 (1979). Because this court has recognized that: (1) a prosecutor's closing argument can violate due process; and (2) the due process clause is applicable to the sentencing phase of a capital trial, the Court of Appeals' opinion did not announce a new rule of law because the decision does not "break[ ] new ground or impose a new obligation on the State[ ] . . . ." Teague, at 1070. There is no articulated test more rigorous than the due process standard applied in the lower federal courts to assess the prejudicial impact of this improper closing argument and having survived that test Respondent should not be forced back into the storm by the application of a different standard of review to see whether he might this time be "struck by lightening." Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). Petitioner's argument that due process does not apply to penalty-phase arguments must be

rejected.°

Perhaps anticipating this Court's ruling in Butler v. McKellar, 58 U.S.L.W. 4294 (1990), Petitioner finds justification for his conclusion that the result was not "dictated by Donnelly because the Missouri Supreme Court, the Missouri Court of Appeals, and the St. Louis County Circuit Court did not find constitutional error in review of the closing argument. The St. Louis County Circuit Court expressly refused to consider the closing argument because the "issues were addressed on appeal" (App. 114). The Missouri Court of Appeals did not review the closing argument, but simply relied on the holding by the Missouri Supreme Court in Newlon's direct appeal (App. 105). Only the Missouri Supreme Court reviewed and articulated its reasoning for rejecting Respondent's claim of constitutional error. If Petitioner's argument is sound, rejection of any claim by a state court would be conclusive proof that the result could not have been "dictated" by precedent at the time the conviction became final. By this simple commandment, relief from an unjust conviction or sentence would be foreclosed from collateral review, thus abolishing the Writ of Habeas Corpus. If "Congress

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° Because the penalty phase procedure in Missouri "was like the trial on the question of guilt or innocence", Bullington v. Missouri, 451 U.S. 430, 446 (1981), it would be appropriate to examine closing arguments under the same constitutional standard used to assess error in the guilt phase. Accord, Strickland v. Washington, 466 U.S. 668, 686 (because "a capital-sentencing proceeding . . . is sufficiently like a trial, the standard for determining effectiveness of counsel at the sentencing phase is identical.")

established [habeas corpus] review because it perceived a potential 'inadequacy of state procedures to raise and preserve federal claims and was concern[ed] that state judges might be unsympathetic to federally created rights.'" Butler v. McKellar, 58 U.S.L.W. 4294, 4300 (dissenting opinion, Brennan, Marshall, Blackmun and Stevens) (quoting from Kaufman v. United States, 394 U.S. 217, 225-226 (1969), and as an "additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards[ ]" Butler v. McKellar, supra, at 4296, quoting from Teague v. Lane, then it is inconceivable that a state court's rejection of a "constitutional standard" would forever insulate their decision from federal collateral review.

There was ample precedent for the Court of Appeals' due process condemnation of the prosecutor's closing argument. Respondent's rights to a fair sentencing proceeding do not require the application of any new principle of law. The Petition for Writ of Certiorari should be denied.

CONCLUSION

Considering the existence of significant and substantial error that the Court of Appeals did not deem necessary to address, and for the reasons stated herein, this Court should refuse review of Petitioner's case. The judgment of the United States Court of Appeals for the Eighth Circuit should be left intact and this Court should deny the Petition for a Writ of Certiorari.

Respectfully Submitted,

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